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WISCONSIN REPORTS C 7

167

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

FEBRUARY 5 — JULY 27, 1918

FREDERIC K. CONOVER
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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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WALTER C. OWEN

Attorney General - - SPENCER HAVEN

Clerk - - - - ARTHUR A. MCLEOD

MEMORANDA.

This volume includes all the cases, not previously reported, which have been finally determined by the court. In five cases of the January term, in which opinions were filed in June and July, 1918, motions for rehearing are still pending.

Attention is called to the Appendix (pp. 637–653) containing the Supreme Court Rules as they now exist, with reference to cases in which they have been cited since their adoption in 1906; also amendments to the Circuit Court Rules, adopted June 5, 1918.

Madison, August 31, 1918. F. K. C.

ERRATUM.

VOL. 166.

Page 518, lines 12–15 should read:

For the respondent there was a brief and oral argument by *Charles E. Pierce* of Janesville, attorney, and *Harry L. Butler* of Madison, of counsel.

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IN MEMORIAM.

MICHAEL ANGELO HURLEY.

On the 5th day of March, 1918, Mr. G. D. Jones of Wausau addressed the court as follows:

May it please the Court:—The committee appointed by the Marathon County Bar Association herewith presents to the court the following memorial of the life and services of the late MICHAEL ANGELO HURLEY:

Memorial of the Marathon County Bar Association.

MICHAEL ANGELO HURLEY was born at Bytown, now Ottawa, Canada, October 22, 1840, and died at Wausau, Wisconsin, September 25, 1917. His father, William Hurley, was a graduate of Trinity College, Dublin, and his grandfather was a lieutenant in the British army and was killed at the battle of Waterloo. Mr. HURLEY'S father came to America at an early age and moved to Ogdensburg, New York, shortly after Mr. HURLEY'S birth, and died there when Mr. HURLEY was ten years old. His mother was an invalid after his father's death, and Mr. HURLEY'S early opportunities for an education were small. He supported himself by work on a farm near Ogdensburg until he was sixteen years old, and attended the country school when he could. He worked as a sailor on the Great Lakes for a time, and came to what is now Schofield, in the vicinity of Wausau, Wisconsin, in December, 1857, and worked there in the sawmill of Doctor Scholfield, as a millhand, for a year. He then went to Stevens Point, Wisconsin, where he worked for his board and studied hard with the aid of two local clergymen and the principal of the schools for a few years, teaching school winters and working summers. In 1861 he went to Chicago and worked there as a hotel clerk for six years. During this time he took private lessons under professors of the old Chicago University and practically completed the classical and literary course of the college. He then came to Berlin, Wisconsin, and studied law with Hon. Thomas C. Ryan, his later partner, and was admitted to the bar at Dartford, now Green Lake, in Green Lake county, in 1869. He at once engaged in the practice of law at Berlin, Green Lake county. He was successful from the beginning and was elected district attorney of that county in 1872, which office he resigned about a year later and came to Wausau, Wisconsin, and entered into partnership with Hon. Willis C. Silverthorn, under the

firm name of Silverthorn & Hurley. In December, 1883, his old preceptor, Judge Ryan, became a member of this firm, and in July, 1886, G. D. Jones, who had studied law with the firm, joined the partnership, which continued under the name of Silverthorn, Hurley, Ryan & Jones until Judge SILVERTHORN became circuit judge in the spring of 1898. Mr. Ryan retired from the firm in 1902, and the firm continued as Hurley & Jones until it was dissolved by Mr. HURLEY's death.

Mr. HURLEY married Miss Clara H. Leonard, of Berlin, Wisconsin, in 1874, who survives him. They had two children, one of whom, Fred N. Hurley, died in California in the spring of 1897, and the other, Judson B. Hurley, is married and lives in Wausau.

Mr. HURLEY was a charter member of the Wisconsin State Bar Association upon its organization in 1878, and was for many years one of its vice-presidents, and was its president in the year 1910–11. He was also one of the first members of the state board of examiners for admission to the bar, and held this office until his resignation about 1890. From 1889 to 1897 Mr. HURLEY spent most of his time in California in connection with the Hurley Gold Mining Company, at Westpoint, Calaveras county, and resided with his family at San Francisco.

Mr. HURLEY's personality was clean, dignified, and most attractive. He loved the practice of the law, and into it he put his heart and the pride of a good workman. He was painstaking and tireless in preparing his cases thoroughly for trial, and was seldom surprised by any adverse facts produced by the opposition. As a trial lawyer he had few equals. The reports of the Supreme Court of Wisconsin from 1874 to 1891 contain the records of the most active years of his service at the bar of this state, and upon this record his fame as one of Wisconsin's great lawyers chiefly rests. The litigation he conducted was important. His success was notable, and his zeal, earnestness, thoroughness of preparation, and absolute fairness in his trials won for him the confidence of his clients, the admiration of his associates at the bar, the respect of his adversaries, and the esteem and confidence of the bench. The Supreme Court of Wisconsin has never paid a higher personal compliment to an attorney than the tribute to Mr. HURLEY in its decision in one of the most important equity cases ever brought in our state, *Willard v. Comstock*, 58 Wis. 565, at page 579, which reads:

"In simple justice to Mr. HURLEY, the eminent counsel of the appellants, we may well say that he presented his side of the case with great ability and zeal."

In appreciation of his service in this most important litigation, clients of Mr. HURLEY, in laying out a townsite on the iron lands finally restored to them by this decision, gratefully named the city of Hurley in his honor.

Michael Angelo Hurley.

Nearly nine of the best years of Mr. HURLEY's active life were spent in the state of California, from 1889 to 1897. He and his associates had been heavily interested in mining properties there and the panic of 1893 brought them to the verge of ruin. Mr. HURLEY had been forced to look after this important business and he remained there bravely at his post, and, with financial ruin staring him in the face, made one of the bravest and most self-sacrificing battles on record. He unselfishly sacrificed his own large private fortune to save his friends, and honorably emerged from this effort in the fall of 1897 practically penniless, but with all obligations against his company fairly paid. He then returned to his old home in Wausau, re-entered the practice of law with his old-time courage and vigor, and his friends have all rejoiced at the success and prosperity which crowned his efforts. The last years of his life were happily spent in his home at Wausau and in travel, and he passed away rich in the love, honor, and respect of all who knew him.

Mr. HURLEY was a gallant gentleman. He abounded in wholesome life. He was just, considerate, and genial in his social intercourse, and most lovably open and generous with his friends. He had no political ambition and steadfastly refused political preferment, but he was public-spirited and always glad and ready to serve his state and community in every good cause. He was conspicuously free from indulging in personalities, and had perfect respect and charity for every man. In politics he was a Republican, in his church life a Presbyterian; in his familiar intercourse with his neighbors a kind and considerate friend. He was generous, loyal, and true in all the relations of life, and his nature sparkled with overflowing cheer and genial humor and wit. And withal, dignity was a distinguishing characteristic. With a personality that was winning in its friendliness and a name that might have invited familiar abbreviation, he was always affectionately known as "Hurley." A fine, faithful, honest, and high-minded citizen, who was worthy of any honor within the gift of the state, but who preferred the quiet, useful, unostentatious life of a private citizen, his record is written deep in the honor, respect, and affection of all who knew him.

This committee respectfully asks that this memorial be spread upon the records of the court.

G. D. JONES.
LOUIS MARCHETTI.
M. W. SWEET.

On behalf of the court Mr. Justice ROSENBERRY responded as follows:

I knew Mr. HURLEY in the later years of his life. Upon his return to Wausau from California in 1898 he resumed the practice of his profession after an interval of nine years spent in the management

of the mining property to which reference has been made. He was then fifty-eight years of age, but took up his work almost where he had laid it down, and from then on until he retired he conducted a large and important law business. It was my privilege to be associated with him in a number of important trials, and I came to know him as a young man knows an older man and to love him and respect him both as a lawyer and as a man. He was a lawyer and a gentleman of the type often referred to as belonging to the old school. His professional ideals were of the highest, and his devotion to the cause of his clients was unstinted; his manner was always dignified and courteous. He was a man of marked intellectual honesty and integrity. He dealt fairly with his opponents, and he presented nothing to the court or to the jury which he did not believe to be absolutely just and sound. While he had gone through experiences during his residence in California which might well have embittered him, he was nevertheless a man of unusual geniality of spirit in his home as well as in his office. His trying experiences, during which he exhibited the very highest physical as well as moral and intellectual courage, served but to increase his capacity for fellowship and sympathetic interest in the affairs of his friends, clients, and the community in which he lived. He lost, as has been said, nearly his entire fortune, and at a time when his resources were at the lowest ebb he lost his son; but with all these crushing reverses he never lost his kindness of spirit, his optimism, his geniality, and his willingness and desire to serve others.

All young men felt attracted to him. His personality was truly wonderful. While he will be longest remembered because of the celebrated cases with which his name is associated, he will live forever in the love and affection of his friends. He was a man of most remarkable industry. The files of the circuit courts of Northern Wisconsin bear ample evidence of the large amount of work which he did at a time when pleadings, notices, and all papers were drafted by hand. There are literally bushels of these in the handwriting of Mr. Hurley.

He had a keen appreciation of the beauties of classical as well as modern literature, and was especially fond of the great masterpieces of oratory and debate. He remained an open-minded, discriminating student all his life. He died in the fulness of years, honored, loved, and respected by all who knew him. Rising from the humblest circumstances, his life may well be an example and inspiration to the young men of our day. His success was the result of unremitting toil and industry. He had no artificial advantages. His career is another striking example of the ability of a young man, unaided, to seize upon and make his own the wonderful opportunities offered in this country.

This court gladly receives the memorial offered by the bar upon the life and services of this honored citizen, cultured gentleman, and great lawyer, and it will be made a part of the records of this court.

NEAL BROWN.

Mr. Franklin E. Bump of Wausau then addressed the court:

May it please the Court:—The undersigned committee, appointed by the Bar Association of Marathon county, present to the court the following memorial of Honorable NEAL BROWN, a member of the bar of this court, who died at Watkins, New York, on September 18, 1917:

Memorial of the Marathon County Bar Association.

NEAL BROWN was born in Hebron, Jefferson county, Wisconsin, February 28, 1856. His parents, Thurlow Weed and Helen Alward Brown, came to Wisconsin from Cayuga, New York, in 1855, and settled upon a farm in Jefferson county, upon which NEAL worked in his boyhood. His father was, however, chiefly engaged in the newspaper business, which had been his profession in New York. He was also strongly interested in the abolition and temperance reforms of that period and became famous as a writer and public speaker on those subjects. He was a finely educated man of intense feeling and fervent imagination—an idealist, devoted to the reforms which he advocated. His mother, on the other hand, was distinguished for calm judgment and practical business capacity. NEAL was the fortunate inheritor of these qualities of both his parents. The home was well supplied with books and, although his general education was in the common schools only, he early manifested the love of reading and the literary taste that distinguished him in later years.

At the age of nineteen he began the study of law in the office of Honorable L. B. Caswell at Fort Atkinson, and in 1880 was graduated from the law department of the University of Wisconsin. The same year he entered upon the practice of law at Wausau, Wisconsin, and thereafter was a resident of that city.

In 1885, with Louis A. Pradt and Orlando Holway—now Adjutant General of Wisconsin,—he formed a partnership under the name of the Wausau Law and Land Association, Mr. Holway having charge of the real-estate department. Some years later Mr. Charles S. Gilbert succeeded Mr. Holway, and in 1900 Fred W. Genrich became junior member of the law firm of Brown, Pradt & Genrich. During the period from 1897 to 1900 the law firm was Brown, Pradt & Bump, the junior member being Franklin E. Bump, now county judge of Marathon county.

In the first years of his professional life Mr. BROWN devoted himself exclusively and with untiring industry to the study and practice of law and became an acknowledged leader of the state bar. In 1909 he was chosen president of the Wisconsin State Bar Association. His industry and capacity for effective work were extraordinary and resulted in a most unusual comprehension of legal principles. In addition he had every equipment of a first-class trial lawyer. About 1896 he actively interested himself in the real-estate business of his firm, and thereafter he and Mr. Gilbert negotiated and took part in a large number of important real-estate enterprises and transactions in city property, farming lands and timber and mineral lands in Wisconsin and in several other states, including the formation of several real-estate companies.

During the last ten years of his life he turned his attention to the organization of various industrial companies, beginning with the Wausau Street Railway Company, now merged in the Wisconsin Valley Electric Company, whose plants and operations extend along the Wisconsin river from Merrill to Stevens Point.

The development of the water power and establishment of the mammoth plant of the Marathon Paper Mills at Rothschild were largely due to his enthusiasm and tireless effort.

Of both of these organizations he was not simply the founder but the inspiring genius.

Other important companies, in the formation of which he took the leading part, are Wausau Sulphate Fibre Company at Mosinee, Great Northern Life Insurance Company and Employers' Mutual Liability Insurance Company at Wausau, and Chisolm Electric Company in Minnesota.

In all of these enterprises Mr. BROWN showed business capacity of the highest order, undaunted courage in the face of difficulties and disasters, and a firm faith and optimistic vision that were an unfailing inspiration to his associates. Adding to this his great resources as a legal counselor, it is no wonder that the experienced, successful, self-reliant business men who were associated with him came to have such confidence in his judgment as to ask only what NEAL BROWN wanted them to do. Especial instances of his grasp of legal and economic questions and his ability and force in their exposition are his brief on the "progressive" legislation, confiscating the water powers of Wisconsin, and his argument before the Congressional Ways and Means Committee of the first year of President Wilson's administration, upon the relations of the paper industry and the tariff.

He was in the best sense a public-spirited citizen. Under his supervision Wausau cemetery was transformed from a dismal field into

a green and rustling grove. St. Mary's Hospital was built in Wausau because of the gift of its site which he secured; and he had much to do with the acquisition of the spacious grounds of the city high school. Always he encouraged the planting and care of trees, and thus many a green and graceful monument to his public spirit is found today in Wausau.

In politics Mr. BROWN was theoretically a Democrat during the greater part of his life in Wausau. But in this as in every other respect his ideas were catholic and, for a number of years before his death, he was essentially a Stalwart.

He was elected to the State Assembly in 1890 and to the State Senate in 1892, and was twice the nominee of his party for the United States Senate. His political speeches were powerful, eloquent, honest, and fearless.

It is not often that a man distinguished for his legal learning and capacity and as a captain of industry should also possess unusual literary gifts. And yet it is in that respect that NEAL BROWN'S genius may justly be said to have manifested itself most fully. He had an extensive library, covering a wide range of literature, and he literally read every book that he had and assimilated and remembered what he read in a most marvelous degree.

Literature was perforce the occupation of his leisure hours and hence his literary product was not voluminous. But its quality was fine and rare, and it sprang from a source that was inexhaustible and of infinite variety. These gifts were manifested no less in his conversation and in the prodigal wealth of his letters to his friends—and occasionally to his enemies—than in his essays and addresses. In his after-dinner speeches and in the frequent monologues in which he indulged when two or more of his friends were gathered together with him, he was perhaps most interesting and delightful. Whether spoken or written, his literary utterances displayed sincerity, originality, philosophy, humor of every shade but always irresistible, and genuine poetic sentiment, ever enriched with apt and felicitous quotations. His most finished literary production is found in a volume of essays entitled "Critical Confessions," first published in 1898, with which was afterwards bound up his address, "John Marshall and His Times," delivered before the Milwaukee Bar Association in 1901—a veritable masterpiece. In addition he had printed and distributed other addresses delivered by him before various associations in Wisconsin and Illinois, including an address on Abraham Lincoln before the Loyal Legion of Wisconsin, and an essay, "On Growing Old," read before the Phantom Club at Oconomowoc, Wisconsin, in 1913, which is full of true and delicate sentiment.

To this recital of his extraordinary gifts and achievements must

be added, that in his love of nature and his intimate knowledge of her beauties and mysteries, and in his delight and prowess in out-of-door sports, he was equally pre-eminent. To this testify his "Acady on the Plover"—choicest resort of trout fishermen,—the Camp Fire Club, and the Phantom Club; and Deer Foot Lodge, amongst the lakes and forests of Northern Wisconsin, of which he was a founder and the beloved "Big Chief."

It is of NEAL BROWN personally that his friends would most lovingly and admiringly speak, but with a sense of inadequacy to describe him fittingly.

It was said at the death of a great philanthropist that if every one to whom he had shown a kindness were to drop but one blossom on his grave it would be hidden beneath a wilderness of flowers. And so, perhaps, only a composite picture of NEAL BROWN, through the varied recollections and impressions of him contributed by all of his host of friends, could fully portray him.

His most casual acquaintance could not fail to be struck with his wonderful personality—to be impressed with a sense of his physical and intellectual strength and power. It was an impression that deepened upon closer acquaintance, whilst to his intimate friends he grew to be the only NEAL BROWN, whose like they shall not look upon again. He was essentially manly, honorable, and sincere, and so he hated utterly all shams and affectations. To his enemies, and especially to those who aroused his righteous wrath, he was terrible. But with his intimate friends he could be gentle as a child, and for them he reserved his quaint and delicious whimsicalities and his most delectable nonsense. He was generous and the very embodiment of hospitality. Thus he could bring together and entertain at his house and at his beloved Acady, with equal success, men of the greatest distinction or his every-day friends and neighbors, and always in a manner that it was hopeless to emulate.

His patriotism was lofty and fervent. He gloried in his Yankee ancestors, who fought at Bunker Hill, but had an impartial admiration for the Americans who fought with equal valor and devotion on either side in the great Civil War. He had full respect for the worth and virtues of citizens of foreign birth or blood, but fiery indignation for those who held any thought of an allegiance divided between the country whose government they or their fathers had renounced and this, their land of refuge and opportunity. If he were but alive today in his full health and strength, how like a trumpet would his voice ring out for true Americanism and unstinted loyalty to the cause of humanity and democracy which his country has espoused in this world war!

His only near relative, his sister, Mrs. Mabel Green, was with him

and did much to comfort him through several months of his last sickness, and until his final summons to

"The poppied sleep—the end of all."

On the day of his funeral a multitude of his friends, of high and low degree, were gathered about him as he lay at rest in the green amphitheater of velvet lawn, surrounded and shaded by the little forest of trees that he had planted, of the spacious grounds of his home, in which, for so many years,

"used to be
Free-hearted hospitality."

There the simple service that he had asked for was held in memory of him. There was felt such honest and unrestrained grief as only the death of a very rare and lovable man could inspire. And there, beyond a doubt, the spirit of NEAL BROWN looked down with approval upon a scene so fittingly ordered on an afternoon of the most tender and gracious day of the whole year.

March 5, 1918.

LOUIS A. PRADT.
FRANKLIN E. BUMP.
FRED W. GENRICH.

The presentation of the foregoing memorial was followed by remarks by Mr. L. A. Pradt and Mr. Fred W. Genrich of Wausau, no record of which has been preserved.

Mr. Chief Justice WINSLOW responded:

For more than a score of never to be forgotten years it was my privilege to call NEAL BROWN my friend. There was between us that perfect comradeship which only exists between mature men who have tried each other on the world's arena and learned that they may rely implicitly the one upon the other. There is I think no closer friendship than this, no more enduring bond. When once established there is no room for doubt in either heart but only for unquestioning confidence. Eye looks into eye and reads there only truth and steadfastness and unfailing loyalty, and each heart knows that whether there be speech or not the communion of souls is constant and complete. I am proud to believe that such was my relationship to NEAL BROWN. Wisconsin has had no nobler son than he.

Nature was in lavish mood when he was born. She gave him a massive and rugged frame, a head and face leonine in their strength, and, best of all, she endowed him with a soul in which ignoble thought found no abiding place, a great and generous heart, as tender as a woman's, and an intellect which claimed all learning as its field.

He never sought public office, I think, and he held it for only a brief period, yet he was known throughout the state and far outside its borders as one of the really great characters of his generation. When his death was announced the seriousness of the public loss was universally recognized not only by his brethren of the bar, but by the business world as well. It is not too much to say that every one who had met him and felt the power of his personality realized that loss. Only the really great character can command such recognition as this.

He was not what would be called a close or exact lawyer. He had a robust contempt for what Shakespeare calls the "nice sharp quillets of the law." He paid no tithes of "mint, anise, and cummin," but he omitted not the weightier matters of the law, "judgment and mercy and faith." Great things attracted him. Serious questions, important interests, great affairs appealed to him, and upon them he would lavish the wealth of his intellectual powers tirelessly, effectively, and without stint.

His mind was pre-eminently a mind of vision; a mind which passed by the little things and saw only the great things of life, and saw these often with a prophet's eye.

In this sense he was a great lawyer; in this sense also he was a great business man and a great citizen, not only of his immediate community but of the state at large. He delighted in books, and he surrounded himself with the great books of the day as well as with the classics of all ages; he gathered them not as a mere collector, but as one who roamed with discrimination and satisfaction through the great literatures of the world. His conversation teemed with metaphor, quotation, and allusion drawn at will from the stores of his memory, the fruits of his wide though desultory reading. Not only this, but in his daily talk there were deep, broad veins of bubbling humor and homely philosophy which made it a perpetual delight. The same characteristics marked his letters to friends and made correspondence with him a rare privilege.

But after all it was out of doors and under the blue arch of heaven that his nature found its truest expression and most complete satisfaction. His outlaw spirit chafed under the trammels and petty conventions of our artificial life, and ever when the recurring springtime unloosed the icy fetters binding the reluctant earth he turned with joy from the desk, the forum, and the drawing room to the woods, the fields, and the waters. He knew and loved Nature in all her moods, and she kept no secrets from him. Through the groined cathedral aisles of the forest, whose pillars were the trunks of towering pines, through streams whose rippling eddies and tumbling rapids made the music which he loved, he strode with supreme contentment.

Here he surrounded himself with his chosen friends, and here with

gun and rod and by the blazing camp fire one came to know and love him best. At such times and with such friends he had no reserve, and to them he disclosed the inmost depths of his great soul.

The memorial well speaks of his lofty patriotism. He was a great American in every sense. Not merely did his ancestry run back to the "embattled farmers whose shots rang 'round the world," but he was a real democrat (I use the word in its higher sense) in his every thought. He talked not overmuch of his sympathy with his fellow men who were the victims of untoward fortune, nor did he blow any trumpet before him, but he demonstrated his faith by his works. He believed in America and he believed in her mission on the earth; he gloried in the fact that this was the land of opportunity for all; that it stood for liberty and humanity, and even-handed justice to every citizen however obscure, and he believed that, in the present great war, America was fighting the world's battle for freedom because she could not do otherwise.

By his untimely death the forces of patriotism have been deprived of a great leader, one whose compelling personality would have been of inestimable help in the greatest of struggles for democracy.

It is fitting that the final words of love and appreciation and farewell should be said in this place where his struggle with the world began and where his first great triumphs were won. I am sure he would have wished it so, for he was first of all a lawyer, and not merely that, but he was always proud of his profession, even as his profession was proud of him.

But though we shall see our great-hearted friend no more he cannot be forgotten; in spirit he will be ever with us, and not only with us who are now here, but with those who come after us, for

"The glory born of goodness never dies,
And its flag is not halfmasted in the skies."

PAUL O. HUSTING.

On the 30th day of April, 1918, Mr. A. W. Lueck of Beaver Dam addressed the court:

May it please the Court:—The committee appointed by the Dodge County Bar Association herewith presents for record in this court the following brief memorial of the life and services of the late United States Senator PAUL O. HUSTING, whose death occurred October 21, 1917:

Memorial of the Dodge County Bar Association.

PAUL O. HUSTING was born at Fond du Lac, Wisconsin, April 25, 1866, a son of John P. and Mary M. Husting. His father emigrated

from the Grand Duchy of Luxemburg in 1855. His mother is a daughter of Solomon Juneau, founder of Milwaukee.

At the age of ten he moved with his parents to the city of Mayville, Wisconsin, where he continued to reside up to the time of his death. He attended the public schools of Mayville and finished his school education in the law department of the University of Wisconsin. He passed the state bar examination and was admitted to the bar in 1895. At times during his early life he was clerk in a general store, railway postal clerk, mailing clerk in the Wisconsin state prison, and an employee in the office of the secretary of state.

The education which PAUL HUSTING obtained in the public schools and the law department of the University was but small as compared with that acquired through extensive reading, careful thought, and personal research. His investments were invariably in good books rather than commercial enterprises. He was an indefatigable reader, and always took an active interest in public questions and the science of government. Endowed from youth seemingly with an innate desire to aid in the progress of humanity, he schooled himself richly in the fundamentals of free government.

Immediately upon his admission to the bar he commenced practicing law at Mayville, alone, and in 1897 associated himself with C. W. Lamoreux, his brother-in-law, under the firm name of Lamoreux & Husting, with whom he continued in the practice of law until the former was elected county judge of Dodge county in 1911. He then associated himself with his brother, Gustav B., under the firm name of Husting & Brother, which law partnership continued until his election to the United States Senate in 1914, after which he became counsel for the law firm of Husting & Husting, consisting of his brothers, Bonduel A., Barthold J., and Gustav B., having offices in Fond du Lac and Mayville.

He was elected district attorney of Dodge county in 1902 and reelected in 1904; was elected to the State Senate in 1906 and again in 1910. He was the first United States Senator of Wisconsin to be elected by direct vote of the people, having been chosen at the general election of 1914 by a plurality of 967 votes, defeating ex-Governor Francis E. McGovern. His term as United States Senator commenced March 4, 1915, and he took the oath of office at the first session of the Sixty-fourth Congress on December 6, 1915. He always lived with his parents, never having married. He was accidentally shot on October 21, 1917, at Rush Lake, Wisconsin, while pursuing his favorite sport, duck hunting, and died the evening of the same day.

He was an able and distinguished lawyer, was possessed of a very high sense of duty and legal ethics, always recognizing the duties and responsibilities which lawyers owe to each other, to the court, and to their clients. His presentation of every cause, whether to court or

jury, evidenced the fact that in his preparation of the case his aim was to arrive at exact justice and equity as between the parties, always endeavoring to bring clearly before the court and jury the underlying principles of justice upon which he perceived the rights of the parties to be grounded. In presenting testimony in the trial of cases his examination of witnesses was with the view of procuring full disclosure of all the facts, on the principle that the court or jury was entitled to be informed of all the facts and circumstances pertaining to and surrounding the matter at issue. Once convinced that a particular rule of law was applicable to the matter at bar, he was consistently tenacious in his efforts to bring the court to accept his conviction. In his arguments he was at all times fair, and was even willing to admit a weakness in his client's cause. A most powerful advocate was he, for he was forceful, clear, and convincing, and very apt in illustration.

Senator HUSTING's public career commenced when he was still quite young. He interested himself in the affairs of government long before he became a lawyer, and from boyhood days studied and debated questions and matters of public interest, thereby preparing himself for the success and fame which he finally achieved as one of America's greatest statesmen.

To the office of district attorney he dutifully, courageously, and considerately brought all the strength of his noble character and the splendid qualities of his mind. Prosecution was instituted and maintained only after thorough investigation satisfied his mind of the guilt of the alleged offender, and never was prejudice or persecution permitted to become an ally in the conduct of that office.

He was a member of the State Senate during that period in the history of Wisconsin when public policy was undergoing great changes, and he was peculiarly fitted for leadership by reason of his early study and training. He was a leader in that body, and his name is inseparably associated with some of the most important legislation ever enacted in this state. The Senator championed the conservation of the state's natural resources, income tax, two-cent fare, initiative and referendum, election of United States Senator by direct vote of the people, workmen's compensation law, comparative negligence law, prohibition of abuse of the writ of injunction in labor disputes, and many other laws to improve conditions of the workingmen, women, and children. It was he who introduced the resolution to investigate the primary and general elections of 1908, which resulted in the enactment of corrupt practice laws in both state and nation. In the State Senate his efforts to protect and preserve for the people their basic ownership in the water powers of Wisconsin will be of inestimable value to generations yet to come.

Very shortly after he entered the United States Senate he became

one of the leaders of that great body, a position seldom attained by a new member. At the first session of the Sixty-fourth Congress he was placed on the committees of Banking and Currency, Cuban Relations, Expenditures of the Department of Labor, Fisheries, Immigration, Indian Affairs, Industrial Expositions, Public Lands, and the joint committee on Revision of Laws of the United States, and was appointed chairman of the committee on Investigation of Trespasses on Indian Lands, and at the second session of the Sixty-fourth Congress he was appointed chairman of the committee on Fisheries. He participated actively in debates on the floor of the Senate on railroad strike legislation, river and harbor appropriations, railway mail pay, child labor, campaign contributions, increase in our national army, armed merchant ships, water-power development, pay of government employees, Niagara river diversion, retention of public lands containing oil deposits, relations with Germany, amendments to increase military efficiency, amendments to income tax law, and other important questions. It was through his unswerving devotion to and abiding faith in America and American interests in the war with Germany that he rendered his greatest services to our country. It was he who discovered and exposed a nation-wide propaganda to subvert the interests of the United States to the advantage of Germany, and subsequent events have established his conclusions as true and have justified his course in exposing the American Embargo Conference on the floor of the Senate. Senator HUSTING was an American patriot. He stood always for an undivided citizenship, a people united in interest and purpose, and his call to the people of America delivered in the Senate April 4, 1917, will live to inspire coming generations forever. We quote:

"For all these reasons I feel it my solemn duty to support and vote for the resolution now before us, declaring that a state of war exists between us and the German government. In so doing I am not placing myself with those who favor arbitrament of disputes by war—I am only so declaring because it is the last resort of a peace-loving people who refuse longer to have war waged against them without provocation or reason without defending themselves and their institutions. A country that will not defend the lives of its citizens or its rights or its honor will not long endure. When the country is in danger men are called to the colors to defend the nation and the flag. They cannot refuse; their very life is subject to its call and need. Shall it be said, then, that when their lives are menaced or taken that their country is not in duty bound to defend its defenders? No man can long command the respect of his fellow men or even of himself who does not let principle set a standard of conduct for himself and who does not at all times and at all hazards to himself defend his own rights when threatened or invaded. And so no nation can long command the respect of the people of the world or of its own people, or expect to have its rights or treaties respected, or can long endure, which permits expediency, or cowardice, or selfishness to control its actions or its policies."

And again:

"I say no nation can surrender its substantial right without in the end embroiling itself and in the end losing itself. American lives and American rights must be held and kept sacred against the acts of any foreign nation the world over, and the flag must be a protection and shield to every American, wherever he may be, while in the pursuit of a lawful and proper business. If we expect and demand that every American shall love his country, we must in return be ready at all times to prove that his country loves him. If the time ever comes when this shield and protection shall be withdrawn, then, indeed, the flag is a mockery and the name of America will become a shame and a byword."

And he concluded with this memorable appeal:

"The step that we are about to take and which we take reluctantly and sorrowfully will, nevertheless, be taken hopefully, firmly, patriotically, courageously, and resolutely. Let us all stand together, united in spirit, purpose, and determination, and let us rise to meet the issue with the same faith, courage, devotion, and resolution that have sustained, inspired, and distinguished the American people always."

And so was delivered the thought of HUSTING, and so became his name a watchword in American homes and institutions. The history-making speech from which these quotations are taken, and the exceptionally high comment which followed by press and individual, placed the name of HUSTING alongside of those of our greatest statesmen. He truly builded for himself a "*monumentum ære perennius.*"

The acts and deeds of Senator PAUL O. HUSTING will live forever, and their greatness was given added characterization by his dying words: "Tell them I did the best I knew how."

A. W. LUECK.
F. H. CLAUSEN.
GEO. C. WHEELER.
EUGENE A. CLIFFORD.
CHAS. A. KADING.

Mr. Lueck then spoke as follows:

May it please the Court:—I cannot forbear adding to the record being made here today a few remarks relating to the life of HUSTING as a United States Senator. The services which Senator HUSTING rendered to his country afford to the American people an example of that honesty of character and loftiness of faith which characterizes true Americanism. And, naturally, to those of us who were fortunate enough to have known him intimately, and to have known the spirit which carried him forward, comes a keener realization of the intelligent decision with which he executed his purposes. He recognized that proper performance of his duties as a public servant required not that he should merely give assent to the guiding thoughts

and declarations of others, but that he too should build and create and add to the already powerful structure of our nation. His speech on the floor of the United States Senate on April 4, 1917, from which quotations are found in the memorial herewith presented, stamped him as one possessed of that sterling quality, initiative, and as a thinker and a leader. But of all the worthy influences which he exercised while at Washington, to my mind none is greater than his exposure of the American Embargo Conference. The mere exposure of an insidious propaganda, such as we now know this to have been, is in itself a great achievement, but when done confronted with difficulties such as beset Senator HUSTING, it adds luster to his statesmanship. I relate this so that there may be permanently recorded a few facts concerning the storm which beat about the redoubtable HUSTING. The American public should know all that was done and all that was attempted to be done which might confuse the mind and leadership of one not possessed of the same qualities and characteristics as HUSTING.

I believe it is not generally known that before the Senator produced in the Senate the many telegrams which he had received, and which he traced to the American Embargo Conference, he was admonished by friends and acquaintances and even by United States Senators that by such disclosure he would blight his own career and wreck the party of his political faith. Yes, warnings of like import were more numerous than the moral support which any human might crave in such a crisis. Senator HUSTING later acknowledged that one Senator, whose name he did not divulge, delivered to him similar telegrams, which this Senator had received from his constituents, under promise that mention of his name be withheld.

But he was steady and staunch, firm and true. He was as strong as Gibraltar with the tempests and waves beating about her. Nothing could obscure his vision of his duty to his country. He was inspired by the justice of our nation's cause, and he would gladly have sacrificed all that he possessed upon the altar of his inspiration to shatter the underpinning of any un-American thought or purpose. Many of the telegrams which he received were sent with a most innocent purpose in mind; and there it was that deception was attempted to be practiced, not in all cases by the direct sender of these telegrams, but by causing them to be sent through many of his old friends and acquaintances. But the mind and foresight of Senator HUSTING was not satisfied that the ultimate purpose was as innocent as the intent of many of the senders; he looked for and found the source of this menace; he asserted and proved that these telegrams were sent at the suggestion and guidance of propaganda active in our country, supported directly and financially by the German government. He was not concerned with any criticism that might follow,

for he had first satisfied himself that he was right. Always in close touch and sympathy with the common people, and appreciating that his duty lay in service to the American people as a whole, he laid aside all thought of personal interest or welfare. Understanding the faith of Americans in all things common and just, PAUL HUSTING, following the imperishable thought of the great Lincoln, dared to do his duty as he understood it. He fearlessly declared that if ruination must follow performance of what he deemed his duty to his country he was perfectly willing to accept the consequences.

His was the intuition and statesmanship which springs from love of country, builded upon the principles of free thought. His was Emerson's conception of our country and its place among the nations of the world: "Let us realize that this country, the last found, is the greatest charity of God to the human race."

Senator HUSTING was a loyal American, devoted and true to his country, wholly unaffected by each and every ulterior influence. Nothing more can be said of any man.

Mr. Chief Justice WINSLOW responded:

Measured by years the life of our deceased brother was short; measured by labor and achievement it was long and complete. We may not say that he reached the highest rank in his profession; I think he would not make that claim himself. He was industrious, forceful, logical, direct in his methods, strong in his presentation of his case, honest in his thought and in his deed, and all these things go to make up the character of the great lawyer.

But, as the memorial truly says, questions of economics, of government, and of state-craft attracted him; the great problems of the day relating more especially to the attainment of what has been called social justice, the curbing of privilege, and the equalizing of opportunity under modern conditions, possessed for him an absorbing interest, and to their study he devoted much of the time which the lawyer should devote to the law alone if he would ascend to the topmost rungs of the professional ladder. And so very naturally he turned aside from professional labors and drifted unavoidably into the political sea.

It was a time when new and great economic, sociological, and political questions were pressing for solution, and to them he devoted his time, his energy, and his thought.

His labors in the State Senate are matter of history. Although a member of the minority party it can be truly said, I think, that during his eight years of service in that body no Senator did more efficient labor or exerted a greater influence over legislation than he. It is not necessary that one should agree with his views on all subjects in order to do justice to his character and achievements. He was

frankly radical on many important questions; one may be convinced that he carried his radicalism too far and yet be able to recognize his honesty of purpose, his high ideals, and his great value as a public servant.

He carried to the Senate of the nation the same industry, the same high purpose, and the same devotion to the people's interests which had marked his career in the Senate of the state.

Not endowed by nature with an impressive physical presence, he more than made up for his lack in this regard by the more enduring and useful qualities which I have named. His colleagues in the Senate were not long in discovering his true worth and he early took a position of influence in that great body rarely attained by a newly elected Senator in so brief a time.

But his great claim to be remembered by his state and nation will always be found in his sterling patriotism. He was an American who stood four-square to all the winds that blew. He knew but one duty when democracy was at stake, he heard but one voice when his country called.

He was the very first to discover and denounce upon the floor of the Senate the insidious propaganda which was being carried on in this country to clandestinely influence the representatives of the people and make it appear that there was a great volume of public opinion in the nation contrary to the real fact.

PAUL HUSTING knew not how to court political favor by truckling to class or race prejudice at such a time. He scorned to consider whether political advantage could be gained from this course or that course. He never hesitated nor quibbled for a moment; he saw his country's future trembling in the balance; he saw the world's liberty and the right to self-government threatened with destruction, and his loyal heart made instant response without counting the cost or weighing the effect on his political future. After this great service to the nation we thought not so much of the able lawyer, the high-minded citizen, and the lawmaker, but rather of the great patriot. By that act of patriotism his name became a name to conjure with, a very trumpet call to patriots in every corner of the land.

This constituted his real greatness, this entitles him to have his name forever preserved in the history of the nation and of the state as one of the names which cannot die.

CASES DETERMINED

AT THE

January Term, 1918.

DAVIS, Appellant, vs. ESTATE OF SMOCK, Respondent.

January 9—February 5, 1918.

Married women: Separate property: Individual earnings: Claim against decedent: Admission of payment: Estoppel.

[1. Whether, where a farm is owned in part by the wife and in part by the husband and is operated by both together, an agreement between them that all charges for board and care of a third person shall be considered her individual earnings and separate business is a valid agreement, not decided.]

2. During the last eleven years of his life a childless widower had made his home with his deceased wife's niece and her husband. There had been a considerable number of money transactions between them, and he had conveyed to the husband thirty-four acres of land with buildings for an expressed consideration of "one dollar and other good and valuable considerations." He also had done light work about the house and at times had purchased groceries for use in the home. While, as the niece knew, he was having his will drawn he called her into the room and asked her how much he owed her for board and care, to which she replied "Nothing; you have paid us over and over again." He then completed his will, making to her a bequest of $200. *Held*, that he was entitled to rely and to act, as he did, upon her admission, and that she was estopped to make any claim against his estate for his board and care.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Claim for $2,000 against the estate of John Smock made by *Laura M. Davis,* a married woman, for board and care

during the last eleven years of the life of the deceased. Smock died January 19, 1914, a childless widower of the age of sixty-nine years, at the farm home of the claimant and her husband, where he had made his own home for more than eleven years except for occasional absences when he visited other relatives. The claimant was a niece of Smock's deceased wife, and called him "Uncle." The relations between the parties were always of the kindest. There was no contract between them. Smock did more or less choring and odd jobs about the farm. He was not in good health and was confined to the bed at various times (how long does not appear) with lung and bowel difficulties. At times he lost control of his bowels and his care at such times was necessarily an unpleasant task. The claimant and her husband lived on an eighty-acre farm. The title to the homestead forty was in the claimant's name, she having paid $200 of the purchase price out of her own money. The title to the other forty was in her husband's name, and both were worked as one farm. There were several children. The husband managed the farm, the claimant kept the house, and the business was carried on about as usual under similar circumstances, groceries and other supplies being purchased in the name of the husband and products sold in his name. The claimant testified, however, that it was understood between herself and her husband that the hens were her individual property and that whatever was due or received for board or care furnished to Smock was the claimant's individual and separate property. Smock had disposed of his own farm and home when he took up his residence with the claimant, and had at that time a piece of land of thirty-four acres adjoining the Davis farm, some ready money (how much does not appear), and a pension of $24 a month from the United States government. July 9, 1908, Smock loaned to claimant's husband $475, taking a mortgage on one forty of the Davis farm as security. Interest on this mortgage was paid up to July 9,

1912, and the principal and remaining interest was paid by claimant's husband to the executors of the Smock estate shortly before this claim was filed. December 9, 1913, Smock by warranty deed conveyed the thirty-four-acre piece before mentioned to the claimant's husband "in consideration of one dollar and other good and valuable considerations." There is no evidence tending to explain or contradict this recital of the consideration contained in the deed itself. At the time of Smock's death he had $2,500 on deposit in a bank, besides notes (including the Davis note of $475 above mentioned) amounting to about $800. The quarterly pension vouchers which Smock received were generally taken by him to the village of Irving, near by, and cashed, but the claimant and her husband cashed them several times at the request of the deceased. Smock had $77 in cash on his person at the time of his death.

The court found on ample evidence that on the 16th day of January, 1914 (three days before his death, being then fatally ill but entirely competent), he sent for a scrivener to draw his will, and after the scrivener's arrival asked that the claimant be called into the room. When she came in he asked her how much he owed her for board and care, and she replied, "You owe nothing; you have paid us over and over again," and left the room crying. Thereupon the deceased had his will drawn and left to the claimant a bequest of $200. The claimant admits that she was called into the room and that Smock asked the question what he owed her for board, and she replied, "Nothing, Uncle John, I only wish you could get well and live a while longer." She admits also that she knew he was making a will and explains that she made the statement just to pacify him in his weak condition, and didn't expect he would understand by it that he did not owe her anything.

On these facts the circuit court dismissed the claim on two grounds: *first,* because the claimant, a married woman, was

carrying on no separate business of her own, and that there was no evidence from which it was possible to separate the nursing and care furnished by the wife alone from the board and maintenance furnished by husband and wife jointly; and *second,* that the deceased relied on the claimant's statement that he owed her nothing and drew his will in reliance thereon; hence that she is estopped from now making any claim. The trial judge further added that the inference "is very strong that the deceased had from time to time been paying the plaintiff and her husband for board and care." The claimant appeals.

For the appellant there was a brief by *G. M. & H. M. Perry* of Black River Falls, and oral argument by *G. M. Perry.*

Merlin Hull and *E. J. Jedney* of Black River Falls, attorneys, and *W. H. Frawley* of Eau Claire, of counsel, for the respondent.

WINSLOW, C. J. We should be slow to affirm this judgment on the first ground taken by the trial court, namely, the ground that the present claim for board and care was not, as matter of law, the individual earnings of the wife nor the fruits of her separate business under the married woman's statute (secs. 2343, 2345, Stats.). Where, as here, a farm is owned in part by the wife and in part by the husband and operated by both together, the question whether an agreement between them that all charges for board and care of a third person shall be considered her individual earnings and separate business is a valid agreement, is a question which we do not wish to answer in the negative without more careful consideration than we are now able to give it.

We think, however, that the judgment must be affirmed on the second ground. It is very evident from the testimony that there had been a considerable number of money transactions between Smock and the Davises. A mortgage of $475

given by Mr. Davis to Smock was still unpaid; thirty-four acres of land with buildings worth more than $2,000 had been deeded by Smock to Mr. Davis in 1913 for the consideration, as expressed in the deed, of "one dollar and other good and valuable considerations;" during his stay at the claimant's home Smock did light work such as chores about the house, preparation of firewood, and repairing. The court also found that at times Smock purchased groceries for use in the claimant's home, the amount of which is not proven. The relations between the parties in money matters as well as socially had been very close, and it is quite clear that when, being about to make his will, he called the claimant into his room and asked her how much he owed her for board and care, he wished to find out how much, if anything, she claimed was the balance in her favor. When she replied, "Nothing, you have paid us over and over again," he was entitled to act upon that admission, and it is clear that he did so act. According to the witnesses present he lay a few minutes and then said, "Well, I would like to leave *Laura* a little, I would like to leave her about $200; she has been good to me and I would like to leave her that much more." He then had the will completed, making claimant a bequest of $200, and died in the belief that she had no claim on his estate and that he had made her a gift showing his appreciation of her kindness. Had she said, "You owe me $2,000," or "You owe me a sum which I shall have to figure up," it seems very certain he would not have given her, out of his little estate of $3,000, $200 additional.

There are here all the elements of equitable estoppel. Smock was about to draw his will and the claimant knew it. The question which he asked her was for the purpose of obtaining information on which to act in drawing the will and this she must have known. He accepted her statement as true, and on the basis of its truth made the bequest of $200 to her. The estate will suffer injury if the claimant is al-

lowed to change her attitude now, and this makes the estoppel complete.

The trial judge was of opinion that from all the facts, including the claimant's admission, the inference was very strong that the deceased had from time to time paid the claimant and her husband for his board and care. The judge does not seem to have actually found the fact of payment, but had he done so his conclusion would seem to have ample support in the evidence.

By the Court.—Judgment affirmed.

WOOSTER, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

January 10—February 5, 1918.

Carriers: Interstate commerce: Failure to deliver horses at destination: Misrouting or breach of contract? Jurisdiction of state courts: Delay in transit: Questions for jury: Damages.

1. Where by the contract of carriage a carload of horses shipped in this state was to be delivered at "Allentown Fair Grounds, Allentown, Pa.," but the delivery carrier left the car at Allentown station, and the shipper was obliged to hire and pay another carrier to transport it to the fair grounds seven miles distant, the claim to recover the amount paid to such other carrier is not based on a misrouting, under the interstate commerce acts, but is a claim for damages based on breach of the contract to deliver the shipment at the destination specified, and is enforceable in the state courts.
2. The question whether defendant, the initial carrier, negligently delayed the forwarding of plaintiff's horses is *held* to have been, on the evidence, one for the jury and to have been submitted under proper instructions as to the promptness and diligence required in such cases.
3. An award of $125 (reduced by the trial court from $175) for injuries to horses caused by negligent delay in transporting them is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This action was commenced in justice's court, and from a judgment there rendered in the plaintiff's favor the defendant appealed to the circuit court, where a trial resulted in the judgment in the plaintiff's favor from which this appeal is taken.

The plaintiff sued to recover damages from the defendant on two counts: (1) for alleged failure of the defendant to deliver a car of horses to an agreed destination, thereby putting the plaintiff to extra expense for the delivery of the horses; and (2) for damages resulting from injuries occasioned the horses by alleged neglect which resulted in delay in transit.

The plaintiff on September 11, 1914, delivered a car of racing horses to the defendant for shipment from Rhinelander, Wisconsin, to the Allentown fair grounds, Allentown, Pennsylvania. The horses were loaded in an Arms palace horse car, from which they were not to be unloaded in transit for feed, water, exercise, or rest. The plaintiff made known to the defendant's agent at Rhinelander his desire to connect with a fast Eastern train leaving Chicago the evening of September 13th. Plaintiff's car arrived in Milwaukee at 2:30 a. m. the morning of the 13th. There the plaintiff informed the agent of the defendant company that he desired to connect with the fast Eastern train leaving Chicago that evening. On the way to Chicago the plaintiff's car was placed on a sidetrack at Rawson, where it was held for about four hours, which resulted in the plaintiff's failure to reach Chicago in time to connect with an outgoing fast train that evening. The horses were thereby delayed at least twenty-four hours in transit between Rhinelander and Allentown, the trip lasting from Friday evening, September 11th, to Thursday evening, September 17th. On the last day, the plaintiff claims, the horses, though usually gentle, became res-

tive as a result of the prolonged confinement and lack of exercise, and two of the stallions injured themselves in stumbling and jumping about, and practically all of the horses were more or less affected.

The car was delivered at Allentown and plaintiff had to arrange for its transportation from Allentown to the "Allentown fair grounds," a distance of seven miles. The tracks of the Lehigh Valley Railway Company extend to the fair grounds, and the plaintiff claims that the defendant had delivered previous shipment of his horses at the "Allentown fair grounds." As a result the plaintiff was put to an expense of $13.20 in having his horses transported from Allentown to the fair grounds.

The jury awarded damages on the second count in the sum of $175. The court held such award excessive, and ordered that a new trial be had unless the plaintiff elect to accept $125 as damages on this count, and, the plaintiff having so elected, judgment was entered for such amount in addition to the $13.20 damages allowed on the first cause of action. From such judgment this appeal is taken.

For the appellant there was a brief by *Edward M. Smart* and *R. N. Van Doren,* attorneys, and *Charles H. Gorman,* of counsel, all of Milwaukee, and oral argument by *Mr. Gorman.*

For the respondent there was a brief by *Grady, Farnsworth & Kenney* of Portage, and oral argument by *Daniel H. Grady.*

SIEBECKER, J. The contract between the plaintiff and the defendant specifies that defendant received the horses from the plaintiff in an "Arms palace car" at Rhinelander and that they were "to be delivered to *A. T. Wooster* at Allentown fair grounds, Allentown, Pennsylvania." There is no dispute of the facts that the car with the horses was not delivered at the Allentown fair grounds and that the car with the horses was left by the delivery carrier, the Philadel-

phia & Reading Railway Company, at the Allentown station, seven miles from "Allentown fair grounds." It also appears that plaintiff was compelled to engage the Lehigh Valley Railway Company to have the car with horses transported from Allentown station to "Allentown fair grounds," the place of destination and delivery fixed in the contract, and that he was required to pay the sum of $13.20 for such service. This state of facts permits of but one inference, namely, that the defendant failed to deliver the shipment at "Allentown fair grounds" as it had contracted to do, and that the plaintiff, by reason of such breach of contract by defendant, sustained the damage of $13.20 which he incurred as cost for securing delivery of the car and horses at the fair grounds.

This recovery is not a claim for an extra charge for misrouting under the provision of the interstate commerce acts, but is one for damages caused by defendant's breach of its contract for failure to deliver the shipment at the place of destination specified in the contract. Under these facts and circumstances the defendant is liable for breach of contract which is enforceable in the state courts. *Atlantic C. L. R. Co. v. Riverside Mills,* 219 U. S. 186, 31 Sup. Ct. 164; *Galveston, H. & S. A. R. Co. v. Wallace,* 223 U. S. 481, 32 Sup. Ct. 205.

It is contended that the court erred in holding that the evidence permitted of the inference that the defendant was guilty of a want of ordinary care and diligence in delaying shipment of the horses at Rawson, Wisconsin. The record shows that the car arrived at Rawson about 5 o'clock in the morning, and that the first section of the fast freight for hauling freight of this kind to Chicago left Rawson at about 5:45 a. m. and that the second and slower section left Rawson at 10 a. m. The evidence tends to show that the difference in time of leaving Rawson and arriving in Chicago between the first and second sections of this freight resulted in preventing this shipment being sent out of Chicago on a fast freight in

the evening of that day and in placing it upon a slower train out of Chicago, which prolonged the trip on the road from Rawson to destination about thirty-six hours. The court submitted to the jury the inquiry, "Did the defendant negligently delay the forwarding of plaintiff's horses at Rawson?" and instructed them that

"It is the duty of the defendant to exercise a degree of care in moving freight suitable to the nature of the property and forward it with reasonable promptness and dispatch to the extent of its ability," and "In case of live stock a railroad company is bound to use more expedition than in case of ordinary freight, if such may be used in reason under the circumstances existing, because of its nature and character known to both parties at the time the shipment is made. . . . The fact that there were other cars placed for forwarding at Rawson when the first section of the freight picked up fourteen cars, and that the plaintiff's car was not so placed, does not excuse the delay or excuse the nonforwarding by that train, if it appears to you that by reasonable diligence plaintiff's car might have been included with the string picked up or that by reasonable effort and diligence otherwise on the part of the servants of the defendant the same would have been forwarded on such train."

The very nature and character of live-stock shipments requires a degree of attention, care, and diligence different from a shipment of dead freight. This is clearly recognized by the court's instruction in submitting the foregoing inquiry to the jury. We are persuaded that the evidence upon this phase of the case presented an issue for determination by a jury and that the court submitted it to them with a correct statement of the law applicable thereto. The court properly determined upon the verdict rendered that the defendant is liable for any damages proximately caused by the negligent delay in forwarding plaintiff's horses. The contract of shipment limits defendant's liability to the declared valuation of $100 for each horse, and if they are injured from negligence of the defendant "the liability of said railroad company shall

not exceed said valuation." It is contended that the evidence fails to show that the delay in shipment caused the plaintiff's horses any damage. The evidence on the subject is not free from conflict, and the inferences to be drawn from the facts bearing on this question are not so manifest and clear that it can be held to be a pure question of law for determination by the court. We think the issue was properly left to the jury for determination, and their conclusion that the plaintiff sustained damage as the result of the defendant's negligence cannot be disturbed. The trial court held that the contract of shipment limits the amount of recoverable damages to each animal injured to $100, and that the evidence fully sustains the conclusion that the two stallions were damaged in the sum of $100 and that the sum of $25 would compensate plaintiff for care of their injuries and such care as the other horses required and for sums expended by plaintiff for medicines. The court reduced the jury's award accordingly. The plaintiff does not object to this reduction of the amount of damages found by the jury. It is considered that the evidence is sufficient to show that the horses were injured, and the court's determination of this question must stand. We find no reversible error in the record.

By the Court.—The judgment is affirmed.

GLANDER and others, by guardian *ad litem,* Respondents, vs. GLANDER and another, Appellants.

January 10—February 5, 1918.

Trusts and trustees: Oral agreement to convey land: Possession: Performance: Evidence: Transactions with decedents: Competency of witnesses: Parol evidence affecting writings: Consideration for conveyance of land: Following trust fund: Persons liable as trustees.

1. Findings by the trial court that an oral agreement was made between E. (plaintiffs' deceased father) and his parents that in consideration of his supporting and caring for them during their lives they would convey to him their farm and personal property; that by virtue of such agreement he took actual possession of the land and personal property and continued in possession thereof; and that he fully performed the agreement on his part, are *held* to be sustained by the evidence.
2. The action being to establish a trust in plaintiffs' favor in respect to said land (the legal title to which had come to a brother of E.) or in the proceeds of a mortgage thereof, E.'s widow was not incompetent, under sec. 4069, Stats., to testify to the making of said oral agreement, since the plaintiffs did not claim from, through, or under her, and she was not a party, either necessary or proper, to the action, and, E. having never been seised of the premises, she was never entitled to any dower interest therein.
3. Parol evidence was admissible to show that a mortgage of said land, given by E.'s widow to his brother when the latter conveyed the land to her, was to be held by the brother as trustee for the plaintiffs, E.'s children, although such trust was not expressed in the instrument.
4. The true consideration for a conveyance of real estate may always be inquired into and established by parol, although upon its face the conveyance be absolute.
5. The amount of the mortgage above mentioned having been paid to E.'s said brother after a sale of the land, and the purpose of this action being to follow said fund and impress it with a trust in favor of plaintiffs, another brother of E., who received no part of said fund, cannot be held liable therefor as trustee, even though he may have assisted the brother first mentioned by making false representations to E.'s widow.

APPEAL from a judgment of the circuit court for Fond du Lac county: E. V. WERNER, Judge. *Affirmed as to one defendant; reversed as to the other.*

An action in equity to compel an accounting and establish a trust in favor of the plaintiffs. Frederick Glander and Augusta Glander, his wife, had five children: *Albert,* Carl, *Leo,* Ewald, and Minnie, married Heise. *Albert,* Carl, and *Leo* left home before attaining their majority. Ewald remained to work the farm. Ewald married one Amelia, and to them was born one child, the plaintiff *Lauretta.* Ewald purchased eighty acres of land on credit, and being unable to meet his obligations he conveyed the land to his father in December, 1891. In November, 1893, the wife, Amelia, commenced an action against Ewald for divorce, claiming that the deed to the father had been made in fraud of her rights. The divorce was denied, and in April, 1895, Ewald began an action against Amelia for divorce, which resulted in a judgment of divorce in favor of Ewald, alimony of $350 being awarded to Amelia. Ewald continued at home, and on October 10, 1897, married Anna Brusser, who is the mother of the other plaintiffs: *Elsie, Nettie, Frederick W.,* and *Loretta.* On September 24, 1908, Ewald was accidentally killed. The trial court found that some time between December 31, 1895, and October 10, 1897, Frederick and Augusta Glander entered into an agreement with Ewald wherein and whereby it was agreed that Ewald was to clothe and support and maintain the father and mother jointly and severally during their and each of their lives and care for them in old age, and that in consideration thereof it was agreed by the father and mother that they would convey to Ewald all their personal property and the premises in controversy here; that at the time of the making of said agreement and by virtue thereof Frederick and Augusta delivered to Ewald the absolute possession of their

personal property and the premises referred to; that Ewald took actual and physical possession of the said personal property and real estate by virtue of said agreement and assumed the performance of the obligations contained in the agreement; that the agreement was not reduced to writing nor was a deed of the lands executed, but it was understood and agreed that the farm and property were to belong to Ewald on performance of the terms of said oral agreement, and that Ewald continued in the possession of said property and fully performed the terms of the agreement.

On April 22, 1897, the father, Frederick, through a third party, deeded the farm and personal property in question to the mother, Augusta. Frederick died August 10, 1899. The mother continued to live with Ewald until March 1, 1900, when she went to live with her daughter, Mrs. Heise, where she remained until May 8, 1900, when she was taken to *Leo's* house, where she died September 4, 1901. On July 2, 1901, the mother, Augusta, made a conveyance to *Leo* of the real estate in question and the personal property thereon. Ewald, however, remained in the undisputed possession of the property, treating it as his own, and had the exclusive control and management thereof down to the time of his death, neither his right to the personal property nor to the real estate being in any way brought in question by *Leo* or *Albert*. The trial court further found that on October 12, 1901, *Leo* negotiated for the sale of and sold for $3,000 a part of the lands conveyed to him by the mother, the entire proceeds of the sale going to Ewald, he using the money so received to make improvements on the lands in question and in paying off incumbrances then outstanding. The court further found that upon the death of Ewald the defendants *Albert* and *Leo* falsely represented to Anna, the widow of Ewald, that *Leo* was the sole owner of all the personal property and real estate of which Ewald had possession, and that in order to carry out their fraudulent design *Leo*

and *Albert* represented to Anna that they would cause the said land and personal property to be conveyed to her; that in consideration thereof Anna agreed to pay a certain mortgage of $1,400 then outstanding on the lands and to pay the judgment of $750 in favor of the first wife, Amelia, and she was induced to make and execute a certain mortgage to *Leo* dated November 10, 1908, for $9,850; that in order to carry out their fraudulent design *Leo* and *Albert* represented to Anna, the widow of Ewald, that the said sum of $9,850 would be saved and set aside for the children of Ewald, the plaintiffs in this action, the only heirs at law and next of kin of Ewald, and that the mortgage so taken by *Leo* should be in his name but upon their behalf as their guardian; that Anna, relying upon the promises of *Albert* and *Leo,* signed and delivered the mortgage and entered into the transaction with *Leo* in the belief that the heirs of Ewald would derive the full benefit thereof. On January 26, 1911, Anna sold the premises in question, the full amount of the mortgage, $10,757.20, being paid to *Leo* in satisfaction of the mortgage. The court further found that the said sum so paid to *Leo* was received by him in trust for the plaintiffs; that *Leo* and *Albert* are guilty of fraud and have converted the proceeds of said mortgage to their own use, and that they refused to pay the same to the plaintiffs and are jointly and severally liable to the plaintiffs herein; that the purchasers of the premises purchased the same with no knowledge of the claims made by the plaintiffs herein.

Upon the facts as found by the trial court judgment was entered by which it was adjudged that the defendants held the sum of $10,757.20 as trustees for the plaintiffs, and that plaintiffs should recover from the defendants the said sum of $10,757.20 with interest, amounting in all to $14,667.43, with costs and disbursements. From the judgment so entered the defendants appeal.

For the appellants there was a brief by *Duffy, McCrory &*

Duffy, attorneys, and *D. D. Sutherland,* of counsel, all of Fond du Lac, and oral argument by *Mr. Sutherland.*

For the respondents there was a brief by *Sawyer & Sawyer* of Hartford, and oral argument by *H. W. Sawyer.*

ROSENBERRY, J. Defendants claim that the judgment should be reversed (1) because there is no proof of an agreement by the parents, Frederick and Augusta Glander, to convey to the son Ewald, as found by the court; (2) that the court erred in permitting Anna, the wife of the deceased Ewald, to testify to the transaction between the parents, Frederick and Augusta, and Ewald; (3) that the transaction between the widow, Anna, and *Leo* being embodied in the notes and mortgage, their agreement cannot be varied so as to establish a trust in favor of the plaintiffs; (4) that there is no evidence to show that the defendant *Albert* has received or converted any of the proceeds of the mortgage given by Anna to *Leo* to secure the payment of $9,850; (5) that the finding that Ewald fully performed the contract of settlement made between him and his parents is contrary to the weight of the evidence.

No doubt the most serious question in this case is that raised by the first contention of the defendants, that there is not sufficient proof of an agreement between Ewald and his parents. We have carefully examined this question and are agreed that upon the case as a whole there is ample support for the finding made by the trial court. If the testimony of Anna and her mother stood alone, a much more serious question would be presented. The conduct of the parents, of Ewald, of *Leo,* and of Anna can be explained satisfactorily only upon the theory that there was such a valid contract known to all the parties. The fact that *Leo* exacted the payment of $750, the amount of the judgment in favor of the first wife, in cash, and on account of that judgment, is of itself a very significant circumstance so far as *Leo* is con-

cerned. If Ewald had had no interest in the property there was no reason for *Leo* to take this judgment into consideration in any respect. Without referring to the many circumstances which sustain the findings of the court, we will say that in our opinion the findings are sustained by the clear preponderance of the evidence.

As to the contention that Anna, wife of the deceased Ewald, was incompetent as a witness under the provisions of sec. 4069, Stats., the plaintiffs in this action did not claim from, through, or under Anna; she was not a party, either necessary or proper, to the action. Ewald was never seised of the premises; she was therefore never entitled to any dower interest therein, and we see not the slightest objection to her competency as a witness.

It is claimed that the evidence offered to prove that *Leo* held notes and a mortgage for $9,850 as trustee for the benefit of the children was incompetent in that it tended to vary or contradict the terms of a written instrument, to wit, the notes and mortgage. The testimony offered in no way contradicts or varies the terms of the notes and mortgage. From an early day it has been held that the true consideration for a conveyance of real estate may always be inquired into and established by parol, although the conveyance be absolute upon its face; as, for instance, a deed absolute in form may be shown to be in fact a mortgage. Within this principle we think the evidence was properly admitted.

It is claimed there is no evidence to sustain the finding and conclusion of the trial court that the defendant *Albert* was guilty of fraud and therefore liable to the plaintiffs in this action. This is an action begun against the defendants to follow a particular fund and impress it with a trust in favor of the plaintiffs, and the sixth conclusion of law is "That the said *Leo Glander* and *Albert Glander* are hereby charged as trustees of said sum so received." The judgment is that the sum of $10,757.20 so received in payment

of the notes and mortgage was in trust for the plaintiffs and that "the defendants as such trustees are jointly and severally liable to plaintiffs for said sum," etc.

There is no evidence whatever in the record to show that *Albert* ever received any part of this fund; on the contrary, the evidence establishes clearly that he did not. It is difficult to see how there can be joint recovery against two defendants for the same fund,—against one on the ground that he holds the fund as trustee, and the only other possible liability against the other defendant being that he was guilty of some wrongdoing. The fund having been received entirely by *Leo, Albert* having received no part thereof, it must be held that as to *Albert* no liability as a trustee of the fund in question has been established.

It is also contended on behalf of the defendants that the evidence fails to support the finding that Ewald fully performed the contract of support, if it be admitted that there was one. We have examined the evidence in respect to this finding and we think it ample to support the finding made.

Many errors are assigned as to findings which relate to merely evidentiary matters. We have examined all of the errors assigned and find no reversible error except as stated.

By the Court.—As to the defendant *Leo* the judgment of the circuit court is affirmed. As to the defendant *Albert* the judgment of the circuit court is reversed, with directions to dismiss the complaint. One bill of costs will be allowed in this court in favor of the respondents and against the appellant *Leo.*

MENASHA WOODENWARE COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN and others, Respondents.

WISCONSIN & NORTHERN RAILROAD COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN and others, Respondents.

January 11—February 5, 1918.

Railroads: Extensions and spurs distinguished: "Public use:" Powers of railroad commission: Review of order requiring spur track: Reasonableness: Questions of fact: Statutes construed: "Industry or enterprise" to be served by spur: Logging industry: "Practically indispensable to successful operation:" "Unreasonably harmful to public interest."

1. An "extension" of the line of a railroad must, when built, be operated by the company as a common carrier, serving the public thereby on equal terms. It differs in this respect from a "spur track," which, though a part of the railroad system, is in its essence a facility for one shipper or for several shippers, who contribute to its construction.
2. The service of any particular spur track being denied to no industry which it is reasonably feasible for the spur to serve and which contributes an equitable share of the cost of construction, so that all concerns having occasion to use the track in their business transactions with the public are given the right to use it on the same equitable terms, the use is a "public use," although not of precisely the same quality as the public use which pertains to an extension of the main line of a railroad.
3. A refusal by the railroad commission to grant a certificate of convenience and necessity for the building of an extension (under sec. 1797—44, Stats.) does not prevent the commission from ordering the construction of a spur track (under sec. 1797—11*m*) over the same route or a part thereof.
4. Where the railroad commission has found the existence of the essential conditions authorizing it to order the construction of a spur track, the court, in an action brought under sec. 1797—16, Stats., to vacate such order, does not try those questions of fact like a court of first instance, but only determines whether the order is "unlawful or unreasonable," and upon this question the burden of proof is upon the plaintiff to show the fact by clear and satisfactory evidence. If reasonable men might well differ

as to the correctness of the order it cannot be held unreasonable.

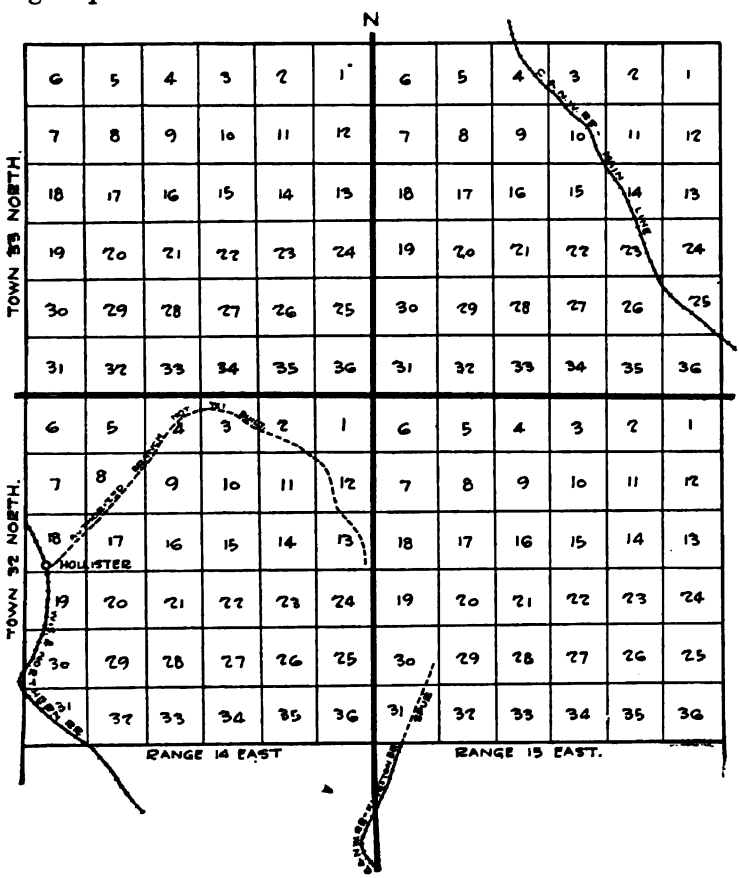
5. Where the owner of a lumber mill owned also a stock of standing timber fifty or sixty miles away which it had bought for the express purpose of furnishing material for the operation of the mill, the cutting of such timber, the shipping of the logs to the mill, and the manufacture of them into lumber are all component parts of one "industry or enterprise," within the meaning of sec. 1797—11*m*, Stats. *It seems* that a logging industry pure and simple, not connected with a mill, may be an "industry or enterprise" within the meaning of the statute.
6. A finding by the railroad commission, as a basis for an order requiring the building and operation of a spur track, that such spur was "practically indispensable to the successful operation of" the industry above mentioned, cannot be held unreasonable where there was evidence that a considerable saving in the transportation of logs to the mill would result, even though reasonable minds might differ on the proposition that such saving was practically indispensable.
7. "Practically indispensable," in sec. 1797—11*m*, Stats., does not mean so essential that the industry would go into bankruptcy without it. "Successful operation" presupposes efficient and economical operation relieved from undue burdens, and means also operation yielding a reasonable profit.
8. The fact that, if a spur be constructed by one railroad, another railroad will lose the carriage of millions of feet of logs, is to be carefully considered but is not controlling upon the question whether an order should be made requiring the spur to be built; and where the railroad commission has made such order it cannot be held that the spur would be "unreasonably harmful to public interest" (sec. 1797—11*m*, Stats.), if reasonable men can say that countervailing considerations, such as the continued successful operation of a great industry employing many men, will outweigh any injury suffered by the public as a result of the decrease in the revenues of said other railroad.

ESCHWEILER, J., dissents.

APPEALS from judgments of the circuit court for Dane county: JOHN J. GREGORY, Judge. *Affirmed.*

These are two actions brought under sec. 1797—16, Stats., to vacate an order of the *Railroad Commission of Wisconsin* commanding the respondent the *Chicago & Northwestern Railway Company* to condemn the right of way for, con-

struct, and operate a spur track one and one-half miles in length from the terminus of one of its branch lines to certain timber lands owned by the respondent the *Oconto Company.* The *Menasha Woodenware Company* owns the land through which the spur track is to be laid, and owns nearly one third of the capital stock of the *Wisconsin & Northern Railroad Company,* a commercial railroad corporation operating a railroad a few miles to the west thereof. The situation will be more easily understood by reference to the accompanying map:



The Kingston branch of the *Chicago & Northwestern Railway* (which connects with the main line road near a station called Kingston, some fifteen miles southeast of the south end of the branch as shown on the map) terminates at the south line of section 31, town 32 north, of range 15 east. The proposed spur extends northeastward about a mile and a half through unoccupied timber lands of the appellant the *Menasha Woodenware Company,* and there reaches a body of lands the timber upon which is owned by the *Oconto Company.* These timber lands extend northwestward from this point in a fairly compact shape through townships 32 and 33, and amount to somewhere near 16,000 acres, with standing timber thereon estimated to be about 160,000,000 feet. The *Oconto Company* has for many years owned and operated a lumber mill at Oconto, Wisconsin, the plant being valued at about $180,000, employing nearly 300 men, and having a capacity of eighteen to twenty million feet per annum when run in the daytime only. The testimony tended to show that this timber was purchased by the *Oconto Company* for the purpose of supplying its mill at Oconto, and that it has no other source of supply. Desiring to obtain railroad facilities for the transportation of this timber to their mill at Oconto, the *Oconto Company* induced the *Chicago & Northwestern Railway Company* in May, 1916, to apply to the *Railroad Commission* for a certificate of convenience and necessity to extend the Kingston branch line about nine miles in a general northwesterly direction through town 32 and ending near the center of section 27, town 33, range 14. Before this application was passed upon the *Wisconsin & Northern Company* applied for a certificate of convenience and necessity to construct a branch line from its station of Hollister northeasterly and then southeasterly, practically along the dotted line indicated on the map, a distance of eight or nine miles, and the *Commission* denied the application of the *Northwestern Company* and granted the

application of the *Wisconsin & Northern Company.* About a mile and a half of said extension has been built, but not sufficient to serve the needs of the *Oconto Company.* This authorized extension is indicated on the map by the dotted line.

The *Wisconsin & Northern Railroad* does not reach Oconto, but runs to Shawano, fifty-two miles south of Hollister. In order to reach Oconto from Hollister freight must be sent to Shawano and then transshipped over the *Chicago & Northwestern* line a distance of forty miles to Oconto, paying two tariff rates, amounting in the aggregate to 3.2 cents per hundred pounds. The distance from the terminus of the Kingston branch to Oconto on the line of the *Northwestern Railway* is about forty-nine miles, and the freight rate on logs 1.6 cents per hundred, making a difference of $2.10 in freight charge on every thousand feet of logs shipped to Oconto. If the spur in question is built it is the intention of the *Oconto Company* to build logging railroads on its own lands running northwestward (very nearly or quite along the surveyed line of the proposed extension which the *Railroad Commission* refused to allow the *Northwestern Railway Company* to build), so as to bring its timber to the Kingston branch for transport to its mills at Oconto.

Both the *Menasha Company* and the *Wisconsin & Northern Railroad Company* appeared before the *Railroad Commission* and opposed the making of the order directing the spur to be built upon several grounds, which are practically the same grounds taken by them in the present actions and may be briefly stated as follows: (1) The proposed spur track is not to serve any "industry or enterprise" within the meaning of sec. 1797—11*m*, Stats.; (2) even if this objection be held untenable, still the spur track is not practically indispensable to the successful operation of any industry or enterprise; (3) the building of the spur track will be un-

reasonably harmful to the public interest; (4) the application for the alleged spur track is not in fact an application for a spur track, but is an application for an extension of the Kingston branch of the *Chicago & Northwestern Railway Company* under the name of a spur track, and could not legally be granted because a certificate of necessity and convenience for such extension was refused in October, 1916, and under the statute no second application for the same extension can be made within two years from such refusal (sec. 1797—49, Stats.).

The *Railroad Commission* by a majority of its members found that the proposed spur "is practically indispensable to the successful operation of petitioner's industry and enterprise, and its construction and operation is not usually unsafe and dangerous and is not unreasonably harmful to public interest."

The circuit court upheld these findings of fact and sustained the order of the *Railroad Commission.* The court also held that the *Wisconsin & Northern Railroad Company* was not a party in interest within the meaning of sec. 1797—16, Stats., and hence not entitled to bring action to vacate the order of the *Commission.* Both complaints were dismissed on the merits, and the plaintiffs appeal.

M. J. Wallrich and *Albert S. Larson* of Shawano and *John C. Thompson* of Oshkosh, for the appellants.

For the respondent *Railroad Commission* there was a brief by *W. C. Owen,* attorney general, *Walter Drew,* deputy attorney general, and *E. E. Brossard,* assistant attorney general; for the respondent *Oconto Company* a brief by *Lines, Spooner & Quarles* of Milwaukee; for the respondent *Chicago & Northwestern Railway Company* a brief by *R. N. Van Doren* of Milwaukee; and the cause was argued orally by *Mr. George Lines, Mr. Van Doren,* and *Mr. Brossard.*

WINSLOW, C. J. The most serious contention made by the appellants in these cases is that the so-called spur track

in question is not really a spur track but is in fact an extension of the Kingston branch of the *Northwestern* line. We are quite unable to see how this contention can be successfully maintained. An extension of the line of a railroad becomes, when built, a part of the railroad system which the company must operate as a common carrier, serving the public thereby on equal terms; a spur track, on the other hand, though a part of the railroad system, is, in its essence, a facility for one shipper or for several shippers, who contribute to its construction, it being understood that it is open to all industries which may be practically served by it, who will contribute such equitable share of the original cost as the *Commission* may determine. In its very nature it cannot serve the public in the complete manner that an extension does, because it is not intended for passenger service and it only reaches the property of one industry, or perhaps several; but its use is none the less public on the part of the one industry or the several industries which it serves, because thereby the one industry or the several industries are enabled to be reached by the public and to be served by the common carrier to the fullest extent. The service of any particular spur is denied to no industry which it is reasonably feasible for the spur to serve, provided the industry pay its equitable share of the cost; in other words, all concerns which can possibly have any occasion to use the track in their business transactions with the public are given the right to use it on the same equitable terms. This must be held public use in a true sense, although not a public use of precisely the same quality as that which pertains to an extension of the main line of a railroad. *Union L. Co. v. Railroad Comm.* 144 Wis. 523, 129 N. W. 605. It necessarily follows that a refusal on the part of the *Railroad Commission* to grant a certificate of convenience and necessity for the building of an extension (under sec. 1797—44, Stats.) does not prevent the *Commission* from making an order requiring the building of a spur track (un-

der sec. 1797—11*m*, Stats.) over the same route or a part thereof. Different considerations apply to the two cases; in fact an extension may not be desirable because a spur is the only appropriate thing under the circumstances. In the present case the *Commission* decided that the building of a spur and not an extension was the proper thing under the circumstances, and the question presented is simply whether a situation was presented which authorized the *Commission* to order the construction of a spur track under the provisions of sec. 1797—11*m*, Stats. That section requires the building and operation of a spur track when the spur is (1) not more than three miles in length and is (2) "practically indispensable to the successful operation of any existing or proposed mill, elevator, storehouse, warehouse, dock, wharf, pier, manufacturing establishment, lumber yard, coal dock, or other industry or enterprise, and (3) its construction and operation is not usually unsafe and dangerous, and (4) is not unreasonably harmful to public interest." No certificate of convenience and necessity is required for the building of a spur track.

The *Commission*, by a majority of its members, found the existence of all of the above mentioned essential conditions, and hence made the order complained of. In these actions brought to vacate that order, under sec. 1797—16, Stats., the court does not try these questions of fact like a court of first instance; it only determines whether the order of the *Commission* is "unlawful or unreasonable," and upon this question the burden of proof is upon the plaintiff to show the fact by clear and satisfactory evidence. As well said by the late Mr. Justice TIMLIN in the case of *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905, "Whether or not the order is within the field of reasonableness, or outside of its boundaries, is the question for the court. It is quite a different question from that which was before the *Commission* in this respect. The

order being found by the court to be such that reasonable men might well differ with respect to its correctness cannot be said to be unreasonable." See, also, *Citizens Tel. Co. v. Railroad Comm.* 157 Wis. 498, 146 N. W. 798.

Applying this test, it seems quite certain to us that no case has been made for the vacation of the order in question. It cannot be said that the conclusions of the *Commission* are unlawful or outside of the field of reason.

It stands admitted that the proposed spur does not exceed three miles in length. It is claimed, however, that there is no industry or enterprise, within the meaning of the statute, to be served by the spur, and that even if there were the building of the spur is not "practically indispensable" to its successful operation.

We see no good reason for holding that a logging industry pure and simple, not connected with a mill, is not an "industry or enterprise" within the meaning of the statute. Here, however, we have a lumber mill at Oconto, owned by the *Oconto Company,* with a stock of standing timber fifty or sixty miles away owned by it and purchased for the express purpose of furnishing material for the operation of the mill for the next fifteen or twenty years. Under the testimony it seems clear to us that the cutting of the timber, the shipping of the logs to the mill, and the manufacture of them into lumber are all component parts of one "industry or enterprise." To hold otherwise would be to convict ourselves of ignorance of the laws of modern business.

It will be noticed that the statute does not require that the spur track terminate at any mill, or building, or yard: it may be anywhere; all that is necessary is that it be practically indispensable to the "successful operation" of the industry. So here, the spur is not at the mill, nor does it connect with any yard, but it reaches the land of the *Oconto Company* at a point where that company can make connection with it by means of its logging railroad and thus trans-

port its logs from the camp to the mill at a saving of $2.10 per thousand feet over any other means of carriage. Now, if there was evidence from which reasonable minds could come to the conclusion that this saving was "practically indispensable" to the successful operation of the *Oconto Company's* business, then the finding of the *Commission* cannot be reversed even though all reasonable minds would not agree on the proposition. That there was considerable such evidence there can be no doubt. "Practically indispensable" does not mean so essential that the industry would go into bankruptcy without it. The statute aims to provide the means for the doing of successful business, not merely for keeping the concern out of bankruptcy. A business which just makes enough money to pay expenses and keep up its plant is not a successful business in any correct sense.

The *Commission* well says in its decision in this case that "'successful operation' presupposes efficient and economical operation relieved from undue burdens." It means also operation yielding a reasonable profit as a reward of efficient and economical operation.

There was considerable discussion in the present case as to how much of a saving (if any) the *Oconto Company* would make by transporting its logs over the *Northwestern* line instead of over the *Wisconsin & Northern,* even conceding that the freight rate would be $2.10 per thousand less. It was said that if the logs are to be got out over the *Northwestern* road, as the fact is, there must necessarily be some greater expense incurred by the *Oconto Company,* not merely in the building of the spur track itself, but in the building of longer lines of logging track. The amount of the additional expense thus made necessary is not capable of very definite ascertainment, but it is certain that it would come nowhere near the saving of freight on 160,000,000 feet of logs. There would still be a net saving of a considerable sum; a sum which might well spell the difference between a successful

and an unsuccessful business or enterprise. The holding of the *Commission* on this question cannot be disturbed.

It is not claimed that construction and operation of the proposed spur would be usually unsafe and dangerous, hence the only remaining question is whether it would be unreasonably harmful to the public interest.

Upon this point the opinion of the *Commission* is as follows:

"It is claimed that if this spur track is built and the *Oconto Company* is not forced to ship its logs over the *Wisconsin & Northern Railroad,* there is a possibility that the authorized branch of the *Wisconsin & Northern Railroad* will not be constructed by that road. Taking this as a presumption, it is testified that some other timber owners may thus be required to sustain the burden of a longer haul to the *Wisconsin & Northern Railroad* than would be necessary were this branch constructed, casting upon them a burden roughly estimated at perhaps $2 per thousand feet and said to be unreasonably burdensome. Be this as it may, the interests of these timber owners and loggers are private, as is that of the *Oconto Company.* In fact, the most definite and specific injury of a somewhat public nature that might possibly result from our action in this proceeding, as shown by the evidence, would be to deprive the city of Oconto of a substantial established industry. Nor do we believe that the public will be benefited if that industry is crippled to the extent of $2 per thousand feet, in order that some other timber man or men will be benefited to an equal amount. And finally and flatly, we must say that there is no evidence in the case tending to convince us that the agricultural possibilities of this region will be discouraged and set back by the building of this spur track for the handling of logs to Oconto and a presumed consequential loss of traffic to the *Wisconsin & Northern Railroad.*

"Nor are we impressed with the argument that mill owners connected with the *Wisconsin & Northern Railroad* have by law acquired the right, when they located on the line of the *Wisconsin & Northern Railroad,* to demand and expect the opportunity of bidding in the open market for the logs

of the *Oconto Company.* Nor can they reasonably expect or demand that unusual burdens will be placed upon the operating conditions of the *Oconto Company,* in order that the timber of that company may be forced into the open selling market along the *Wisconsin & Northern Railroad.* While these claims have been insistently urged upon us by the intervener, both in the testimony and briefs, we do not believe that it was the intent of those that framed the spur-track law that the law should be used for any such purpose."

It is doubtless true that, if this spur be constructed, the *Wisconsin & Northern Company* will lose the carriage of millions of feet of logs which would otherwise necessarily be transported over its line of road. This is a fact to be carefully considered, but is not at all controlling. If the situation is such that reasonable minds can say, as the *Commission* said, there are countervailing considerations on the other side, such as the question of the continued successful operation of a great industry employing many men, which outweigh any injury suffered by the public as a result of the decrease in the revenues of the *Wisconsin & Northern Railroad,* then the order in question was clearly not unlawful or unreasonable.

The conclusions reached on the merits render it unnecessary to decide the question whether the *Wisconsin & Northern Railway Company* is a party in interest entitled to maintain an action under the provisions of sec. 1797—16, Stats.

By the Court.—Judgment affirmed in each case. The *Oconto Company* and the *Chicago & Northwestern Railway Company* to recover their costs in each case, taxing but one attorney fee, however, in each case; the *Railroad Commission* to recover no costs.

ESCHWEILER, J. (*dissenting*). Feeling that the construction and effect given to the statutes under consideration under the facts in this case work an injustice and give to the spur-track statute, sec. 1797—11*m,* a more far-reaching effect and

make it of far higher rank in the line of statutes controlling and regulating railroads than its real purpose and language warrant, compels me to register this dissent.

In 1905 the legislature created the *Railroad Commission,* vesting it with power and jurisdiction to control many features of railroad business. In June and July, 1907, by chs. 454 and 499 of the session laws of that year, a further radical change was made in the public policy of this state. By the first of these chapters further provisions were made for the regulating of the construction and operation of railways by the new sections 1797—39 to 1797—60. By the other chapter, creating secs. 1797*m*—1 to 1797*m*—108, jurisdiction was given to that *Commission* to regulate and control public utilities such as street railways, telephones, electric light and gas companies.

The effect of this new policy was to determine and declare that thereafter corporations which require the support and patronage of the public and which require at times the use of the strong arm of the state under the power of eminent domain in the taking of private property for such corporate use, should all thereafter be required to subordinate their private ends and purposes to the public good and be under public control and regulation. Thereafter substantially all future rights that might be sought to be acquired by railroads or by public utilities were, under the provisions of those chapters, required to first have from the *Railroad Commission* a certificate that public *convenience required* and *necessity demanded* the granting of such future right. Either such certificate of public convenience and necessity when issued to a railroad corporation under ch. 454, Laws 1907, or to a public utility under ch. 499 of the same year, gave, created, or confirmed something of value, an interest of some kind entitled to be secured or defended by the judicial power of the state, or it was quite an idle and vain ceremony and its possession added nothing to or detracted nothing from the

former position of the one to whom the *Railroad Commission* granted it. I take it it would not seriously be contended that it meant something as to public utilities and nothing as to railroads, or *vice versa*.

As to public utilities it has already been held that it has substance; and that it does give or create what may be called a monopoly, with the odious meaning theretofore attached to that term removed (*Calumet S. Co. v. Chilton,* 148 Wis. 334, 358, 359, 135 N. W. 131), a privilege (*McKinley Tel. Co. v. Cumberland Tel. Co.* 152 Wis. 359, 363, 140 N. W. 38; *Wis. T., L., H. & P. Co. v. Menasha,* 157 Wis. 1, 145 N. W. 231; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530). It may at least be considered as a protected privilege, subject to control and regulation but also to recognition and protection by the state until abandoned or taken away in the manner prescribed by law. No reasons suggest themselves why the privilege granted to the *Wisconsin & Northern* as against the similar application denied to the *Northwestern* in the extension proceedings in 1916 should not be considered a somewhat similar protected privilege. By sec. 1797—49, Stats., the refusal of the application of the *Chicago & Northwestern* became absolute for a period of two years from the date of such refusal, October 26, 1916. By sec. 1797—50, Stats., either the *Northwestern* or the *Oconto Company* might have had a review in the circuit court of either or both of such extension proceedings. No such review was attempted. The *Wisconsin & Northern* acted upon the result of such proceedings, incurred expense and liability thereunder by commencing to build the Hollister branch. Practically all that was considered of then value to either the *Northwestern* or the *Wisconsin & Northern* or the *Oconto Company* under the testimony in the extension proceedings is by this decision swept away from the one held to be entitled to it in 1916 and landed in the lap of the other then contestant.

While present or future passenger traffic may be a consideration in some cases of applications for extensions and possibly never in spur tracks, yet in the case at bar passenger traffic was not the consideration before the *Railroad Commission* in 1916; it is undisputed that the then Kingston branch of sixteen miles was devoted practically to no other business than permitting the use of the tracks to the *Oconto Company* for shipping its logs as freight traffic thereon; nor did either railroad in the extension proceedings lay any stress upon possible passenger earnings on either proposed extension. The same questions in substance, essence, and practical effect, if mere nomenclature be disregarded, were before the *Railroad Commission* in 1917 that were before them in 1916 and should be held valid and binding for at least the two-year period fixed by sec. 1797—49.

There are the necessary identities of persons, capacities, subject matter, and ends to be attained found in the proceeding under the extension statutes in the fall of 1916 and these proceedings in the spring of 1917, which would therefore make the former proceedings *res adjudicata*. *Rahr v. Wittmann,* 147 Wis. 195, 202, 132 N. W. 1107; *McMillan v. Barber A. P. Co.* 151 Wis. 48, 50, 138 N. W. 94; *Baker v. Becker,* 153 Wis. 369, 383, 141 N. W. 304; *Zohrlaut v. Mengelberg,* 158 Wis. 392, 148 N. W. 314, 149 N. W. 280. Or even if the identities were not all there to meet the broadest application of the rule just cited, yet the substantial issue as to whether, in view even of the increased cost to the *Oconto Company* in shipping over the *Wisconsin & Northern* rather than the *Northwestern,* which of the two railroads should be given the privilege of access to the logging territory in these townships, was determined adversely to the *Northwestern's* application. There is no new showing here, and the prior determination on that squarely defined issue should be held binding. *Rowell v. Smith,* 123 Wis. 510, 516, 102 N. W. 1.

A lengthy citation is given in the majority opinion from the decision of the *Railroad Commission* on the question of what it considered to be and the view it took as to the question of public interest involved in this spur-track proceeding. A comparison with the written decision made in the extension proceedings by the same *Commission,* although there has been some change in the membership, discloses that the same questions were discussed, and particularly as to what effect the denying of the application of the *Chicago & Northwestern* would have upon the *Oconto Company* by way of increased freight rates. Upon the same situation and possible future effects upon the same parties, the *Commission* in 1916 came to the diametrically opposite conclusion to that arrived at by the *Commission* in 1917. Both the *Northwestern* and the *Oconto Company* could have had a review of such conclusion of the *Commission* in 1916 if either had so chosen. They failed to do so, and I can see no good reason why they should not be bound thereby.

The question of public interest was before the *Commission* in both proceedings and was expressly passed upon by that tribunal in each proceeding; it was required to be considered under the statute as to extensions in determining whether the certificate of public convenience should be given or withheld and under the spur-track statute by the words "not unreasonably harmful to public interest," which words were added to sec. 1797—11*m* by ch. 481, Laws 1909. The addition of these words makes it clear that some consideration must be given the rights of all who might be affected under the spur-track proceeding just as much as under the extension statute.

I see no warrant in the statutes for holding that the *Oconto Company* has a higher standing or more rights in asking to have rails laid down over a third person's property by the exercise of the state's right of eminent domain when it is designated as a spur track or when the same rails are to be

laid and space taken for what is called an extension. If anything, it is more in accord with the present-day view to say that the private interest of any private enterprise is subordinate to and lower than the rights represented by the public interest.

Furthermore, the *Oconto Company* cannot claim the right to have this spur track laid over a third person's property by the right of eminent domain if it is for its private purpose and interest. It is only because such a spur track becomes and is declared to be for a public purpose that the right of eminent domain thereunder can be asserted. This was the precise ground on which the case decided by this court of *Chicago & N. W. R. Co. v. Union L. Co.* 152 Wis. 633, 140 N. W. 346, was affirmed in the same case on appeal to the United States supreme court in *Union L. Co. v. C. & N. W. R. Co.* 233 U. S. 211, 34 Sup. Ct. 522. It is the distinct holding of this court in other cases that as a private enterprise such an applicant as the *Oconto Company* cannot have the right of eminent domain exercised solely in its behalf. *Wallman v. R. Connor Co.* 115 Wis. 617, 620, 92 N. W. 374; *Chicago & N. W. R. Co. v. Morehouse,* 112 Wis. 1, 87 N. W. 849.

That the application for the relief in 1916 was under one section of the railroad law and that in 1917 under another, but both in substance and reality upon the same facts and to attain the same ends, no more affects the substantial rights to be now determined than did the shifting from state law to federal law in the case of *Curtice v. C. & N. W. R. Co.* 162 Wis. 421, 156 N. W. 484, the second appeal of which, again raising the same question, is decided herewith (166 Wis. 594, 166 N. W. 444).

If the substance and results to be attained under the two statutes, as the facts are disclosed in this case, are not identical and similar, although it seems to me they are identical and similar, then it must necessarily follow that they are

dissimilar and necessarily inconsistent. If so, we have a situation where the *Oconto Company* and the *Northwestern* in the spring of 1916 had two separate, independent, and inconsistent remedies by which they might obtain the same result, namely, shipments from towns 32 and 33 over the *Northwestern* in preference to the *Wisconsin & Northern.* The *Oconto Company* and the *Northwestern* elected to choose at that time the remedy under the extension statute, and upon a full hearing the matter was determined against them by that *Commission,* and that order became binding upon them for two years. They elected to take no proceedings to review the same and ought not now be permitted to proceed under this different remedy to obtain the same identical result, in substance and essence, that they were denied the preceding year. *McDonald v. Markesan C. Co.* 142 Wis. 251, 125 N. W. 444; *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1; *Crook v. First Nat. Bank,* 83 Wis. 31, 52 N. W. 1131; 15 Cyc. 259.

For these reasons I think the proceedings below should be dismissed.

OWEN, J., took no part.

SIMMONS, Plaintiff in error, vs. THE STATE, Defendant in error.

January 11—February 5, 1918.

Rape: Resistance: Evidence: Weight and sufficiency: New trial: Newly discovered evidence.

1. Although the circumstances of the crime were unusual, the testimony of the prosecutrix, corroborated by the facts that her hymen was ruptured and that the accused attempted to settle the matter, is *held* to sustain a conviction of rape.
2. Where rape is alleged to have been committed upon a girl in her sixteenth year before the age of consent was raised to sixteen,

her youth and her ignorance of the true character of the act are entitled to much weight in determining whether there was a sufficient showing of the utmost resistance.

3. Where alleged newly discovered evidence tended to prove an *alibi* which was but a branch of an *alibi* which defendant had attempted to establish at the trial, and his attorney was aware of such evidence before the close of the trial, a new trial was properly denied.

ERROR to review a judgment of the circuit court for St. Croix county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

The plaintiff in error (hereinafter called the defendant) was convicted of the crime of rape upon the person of the prosecutrix, a girl of the age of fifteen years and four months. The prosecutrix was employed by the defendant (a veterinary surgeon) three days before the alleged crime was committed to help the defendant's wife with the housework. She had not arrived at the age when menstruation commenced, and she had little information as to sexual matters. She slept on the second floor of the house, in a bedroom next to the bedroom of the defendant and his wife, the doors being open and the gas turned down low. She testified that on the night in question she went to bed at 10 o'clock and the defendant and his wife at about the same time, the doors of the two bedrooms being open and not far apart; that she awoke about 11 o'clock and found the defendant upon her attempting intercourse, and that he succeeded in penetrating her, though she tried to push and fight him off and hollered to defendant's wife several times to make defendant leave her alone; that she didn't know what it meant, but thought it was a dirty action, and for that reason didn't tell her mother the first time she saw her but waited until about a week later; that there were no blood-stains on her garments. It appeared that on examination made by a physician September 21st following, the hymen was found to be ruptured. An offer of settlement was made by the defendant to the prosecutrix and her mother, accompanied, however, by a

denial of any wrong. The defendant was fifty-eight years of age and there was some evidence tending to show that he was not sexually vigorous. The defendant claimed that the evidence was insufficient to establish the fact of penetration, and that even if it were there was not sufficient evidence of resistance on the part of the prosecutrix. There was also evidence tending to show an *alibi* on the night in question, but it appeared before the close of the trial that the witness principally relied on to prove the *alibi* had testified wilfully falsely. A motion for new trial on the ground that justice had not been done, that errors had been committed on the trial, and that new evidence had been discovered, was overruled.

For the plaintiff in error there was a brief by *Varnum & Kirk* of Hudson, and oral argument by *W. R. Kirk.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

WINSLOW, C. J. This judgment must be affirmed. The circumstances surrounding the crime were indeed unusual, as the story is related by the prosecutrix, yet there was corroboration of that story in the fact of the unsuccessful attempt to settle the matter, as well as in the fact of the ruptured hymen. The trial judge, with his superior opportunities of weighing the veracity of the witnesses, has approved the verdict, and we are content to approve his conclusion.

As to the claim that no sufficient resistance or outcry was shown, it is to be remembered that the prosecutrix was not yet a woman, and had no idea apparently what was being done to her further than that it was an indecent act which gave her pain. She had indeed passed the age of fourteen, which is the age of consent as the law stood in July, 1915 (sec. 4382, Stats. 1913), but had the crime been committed two months later no proof of resistance would have been necessary, for by ch. 611, Laws 1915, passed in August of

that year, the age of consent was raised to sixteen years, and it appears that in the great majority of the states the age of consent is fixed at not less than sixteen years and in many at eighteen years.

As to the general question of the amount of resistance required by the law in a case of this nature, this court has very recently said:

"What constitutes the utmost resistance in a particular case must depend largely upon the facts of that case, such as the temperament of the victim, the relations of the parties, her state of health, her physical strength, her age, her experience, her courage, her nervous condition at the time, and perhaps other circumstances naturally affecting her powers of resistance." *B—— v. State,* 166 Wis. 525, 166 N. W. 32.

The youth of the prosecutrix, as well as her ignorance of the true character of the act, are circumstances entitled to much weight in determining what will properly satisfy the requirement of utmost resistance in the present case. In view of those circumstances we are unable to say that there was an insufficient showing of resistance.

The alleged newly discovered evidence tended to prove another *alibi.* Doubtless the trial judge did not feel very kindly disposed toward this claim when it appeared that the main witness brought forward to prove an *alibi* on the trial had changed the dates of certain business transactions on his account book in order to bolster up his testimony; but, however this may be, we think the ruling right on another ground. The new *alibi* was really but a branch of the *alibi* attempted to be established on the trial, and the defendant's attorney was aware of the newly discovered evidence before the close of the trial. He should have made application for time to produce the evidence then and should not have waited until a verdict had been rendered and then sought for a new trial.

By the Court.—Judgment affirmed.

OWEN, J., took no part.

DEMUND, Plaintiff in error, vs. THE STATE, Defendant in error.

January 11—February 5, 1918.

Bastardy: Evidence of complainant's conduct with men other than defendant.

In a bastardy proceeding where the evidence was conflicting as to whether defendant was the father of the child it was prejudicial error to exclude evidence that, at about the time of probable conception, the complainant had associated with other men under suspicious circumstances.

ERROR to review a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

Judgment was entered in this action in the court below June 30, 1917, adjudging the plaintiff in error, hereinafter called defendant, to be the father of a bastard child born alive on the 13th day of September, 1916.

The defendant brings the record here by writ of error for review upon errors assigned.

For the plaintiff in error there was a brief by *E. A. Clifford* of Juneau and *A. W. Lueck* of Beaver Dam, and oral argument by *Mr. Lueck.*

For the defendant in error there was a brief signed by *W. C. Owen,* attorney general, and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

KERWIN, J. The principal error assigned is that the court below excluded evidence offered by the defendant to the effect that during the time the bastard child was begotten, namely, during the fore part of December, 1915, the complaining witness, mother of the bastard child, associated with men other than the defendant, at times and under circumstances indicating that she might have had illicit intercourse with them.

Early in the trial counsel for defendant asked Mrs. Brown, with whom complaining witness boarded in December, 1915, whether the complaining witness stayed at home evenings while she was boarding with her. The question was objected to by counsel for the state as incompetent, irrelevant, and immaterial, and the objection sustained. The district attorney then stated to the court that counsel was trying to show general habits, to which counsel for defendant replied that he wanted to make a record. The trial judge stated that if he had made a mistake the question showed it. Counsel for defendant then stated that he would make the offer after recess, whereupon the judge again remarked that if he made a mistake counsel's question clearly showed it.

The following day, at the close of the evidence, counsel for defendant made the following offer:

"If the court please, I would like to make that offer that we wanted to make yesterday on the record with reference to Mrs. Brown. This is with reference to the testimony of Mrs. Mary Brown.

"We offer to prove by this witness that during the time that the complaining witness, Babe Lewis, stayed with her, which was during the first two weeks of December, 1915, that the complaining witness, Babe Lewis, was out evenings at least six out of seven days of each week, and that she was out until 2 and 3 o'clock in the morning; that she came with different gentlemen escorts."

This offer was objected to as incompetent, irrelevant, and immaterial, and not proper to be made at that time. The court then said:

"The record clearly shows that if there was anything in the record, that if they could show anything with reference to the relations between Breese and the complaining witness, that they were entitled to do so, but that outside of that her conduct was immaterial."

It is plain from the record that the court intended to and did rule out all evidence of the conduct of complaining witness with other men than Breese. The evidence ruled out

and complained of was not ruled out on the ground that it was not seasonably offered, but upon the ground that it was not competent or material. The court obviously, from the time evidence was offered of the nature of the evidence ruled out, knew the character of the evidence which counsel desired to put in, and excluded it on the ground that such evidence was not proper.

We are of opinion that the court erred in excluding the evidence. *Zweifel v. State,* 27 Wis. 396; *Humphrey v. State,* 78 Wis. 569, 47 N. W. 836; *Kelly v. State,* 133 Ala. 195, 32 South. 56, 91 Am. St. Rep. 25; 7 Corp. Jur. 990; *Burris v. Court,* 34 Neb. 187, 51 N. W. 745. The foregoing cases and others which might be cited show that where the evidence is conflicting as to whether the person charged in a bastardy case is the father of the bastard child, evidence of association with men other than the defendant charged, about the time of probable conception, under suspicious circumstances of the character referred to in the testimony offered and excluded in this action, is admissible, and it is error to exclude it.

In *Burris v. Court,* 34 Neb. 187, 191, 51 N. W. 745, the court said:

"In a prosecution for bastardy it is competent for the defendant to prove that, about the time the alleged intercourse was had, the complainant was with a man other than the defendant, under suspicious circumstances. Especially is this true in a case like this, where the testimony is conflicting as to the paternity of the child. The testimony was material and should have been received, leaving to the jury to draw their own conclusions therefrom," citing, amongst other cases, *Zweifel v. State* and *Humphrey v. State, supra.*

But it is contended that defendant was not prejudiced by the ruling. There was a sharp conflict in the evidence as to whether or not defendant was father of the child. The defendant denied positively that he ever had or attempted to have intercourse with the complaining witness and offered

corroborating evidence to that effect. There was evidence tending to show that the complaining witness had intercourse with another man about the probable time of conception, and other evidence tending to cast doubt upon the question as to who was the father of the bastard child. The evidence offered, therefore, was proper for the consideration of the jury and it was prejudicial error to exclude it.

Some other errors are assigned and discussed by counsel which in our view of the case do not require treatment.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

OWEN, J., took no part.

BANK OF EVANSVILLE, Appellant, vs. KURTH, Respondent.

February 5—March 5, 1918.

Sales: Fraud: Written contract: Parol evidence of prior conversations: Bills and notes: Holder in due course: Knowledge of contract affecting payment: Negotiable instruments: Time of payment.

1. Where, in an action upon promissory notes given for a part of the purchase price of an electric lighting plant, one defense was that the purchase had been induced by fraud, parol evidence as to conversations and discussions between the parties to the sale, leading up to the execution of a written contract, was competent on that issue, the terms of the written contract not being sought to be varied thereby.
2. A finding by the jury that at the time of purchasing the notes in suit the plaintiff bank had, through its president, who was also an officer of the vendor of the lighting plant, actual notice of the contents of the written contract of sale, which contained provisions affecting the time of payment of the notes, is *held* to be sustained by the evidence.
3. Construing together a contract for the sale of a lighting plant and promissory notes given for a part of the price, the notes

were, as to persons with knowledge of the terms of the contract, rendered nonnegotiable (under sub. (3), sec. 1675—1, Stats.) by a provision in the contract under which the time of payment of the notes was uncertain and might never occur if the plant failed to earn more than needed repairs.

APPEAL from a judgment of the circuit court for Rusk county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

Action upon two promissory notes. The defense was that plaintiff was not a holder in due course; that defendant was induced by the false and fraudulent representations of the Frost Engine Company to purchase the electric lighting plant at Weyerhauser, for a part of the purchase price of which the notes in suit were given; and that there was a breach of the written warranty contained in the contract of sale accompanying the notes. Such written contract specified, among other things, the plant sold, provided for its removal by the vendor to another location, and for certain future services at fixed prices. The provisions as to payments and warranty were as follows:

"The said *Theo. Kurth* hereby agrees to pay for this plant the sum of four thousand dollars ($4,000) as follows: One note of $1,000 bearing six per cent. interest, payable within three years, or any time after one year from date. This note to be secured by real-estate mortgage. Balance of $3,000 payable in monthly instalments the 20th of each month in sums of fifty per cent. or more of the monthly earnings of the plant. Said payments to be indorsed on one or more of five notes to be given by said *Theo. Kurth,* for the sum of $600 each. . . . In case of serious accident to the plant in case of storm, etc., it is agreed that payments may be deferred on the above notes until the cost of needed repairs can be paid for out of the earnings of the plant. The Frost Engine Company hereby guarantees the above material for a period of one year, and any defective parts or workmanship will be replaced free of cost."

The court submitted the issues to the jury in a special verdict, and the jury found: (1) When negotiating for the

sale of the lighting plant to the defendant, F. S. Frost, the agent of the Frost Engine Company, represented in substance to the defendant, in order to induce him to purchase said property, that the engine had a capacity of at least twenty-eight horse power and that the lighting plant had sufficient capacity to properly light the village of Weyerhauser as it then existed without making additions to the plant for several years; (2) the defendant purchased said property relying upon said representations and believing them to be true; (3) said representations were false; (4) the defendant, considering his intelligence and experience, was justified in relying upon the truth of said representations; (5) the difference in value, including interest, between what the lighting plant was worth and what it would have been worth had it been as represented, was $1,520; (6) the lighting plant, including the engine, generator, and batteries, at the time the plant was delivered to the defendant, was in a defective condition; (7) the difference in value, including interest, between what said property was worth and what it would have been worth if it had been free from such defects and in the condition as guaranteed by the written contract, was $880; (8) at the time George L. Pullen, the president of the plaintiff bank, purchased the notes in question on behalf of the bank, he had actual notice of the existence and contents of the written contract; (9) plaintiff did not purchase said notes in good faith without any notice of the fraud or other unlawful means by which said notes were obtained; and (10) the court found that the face amount of said notes, with interest to date of verdict, less payments made thereon, was $1,102.08. The court entered judgment for defendant dismissing plaintiff's complaint and it appealed.

For the appellant there were briefs by *L. J. Rusk* of Chippewa Falls, attorney, and *T. C. Richmond* and *O. T. Toebaas* of Madison, of counsel, and oral argument by *Mr. Toebaas* and *Mr. Richmond.*

J. W. Carow of Ladysmith, for the respondent.

VINJE, J. The conclusions reached by the court as to the issues and evidence render it necessary to consider only two of the assignments of error alleged by plaintiff, namely: (1) Did the court err in admitting testimony of conversations and discussions by and between the parties in reference to the sale of the lighting plant prior to the time of making the written contract? and (2) Did the court err in affirming the jury's finding that plaintiff was not a holder in due course because it had actual notice of the contents of the written contract at the time the notes were bought? If these assignments of error are not well taken, then the questions of whether plaintiff had constructive notice of the contents of the written contract because Pullen was an officer of both plaintiff and the Frost Engine Company, and whether there was a valid indorsement of the notes, become immaterial.

It is urged that since a written contract of sale was executed after the conversations leading up to the sale were had, parol testimony was inadmissible as to the contents of those conversations. This would be so were the terms of the written contract sought to be changed by such testimony. But that is not the case here. Two defenses were pleaded. One of damages for fraud in inducing the defendant to purchase the plant, the other for breach of the warranty contained in the written contract. There was therefore no effort made to vary the terms of the written contract by parol. The court separately submitted these two defenses to the jury in questions 1 and 6. The conversations were competent on the issue of fraud involved in the first finding. On such an issue a wide range of evidence is permissible.

Upon the question of whether Pullen had actual notice of the contents of the written contract at the time the notes were purchased the evidence is not consistent. The notes

were purchased July 13, 1914. On November 27, 1914, Pullen wrote the defendant as follows:

"As per agreement between you and the Frost Engine Company which they left with us at the time we bought the notes against you, there was a payment due on the same November 20th; possibly this has escaped your notice. Trust on receipt of this letter you will send us a draft and greatly oblige."

On the stand Pullen claimed that the statement that the agreement was left at the time the notes were bought was a mistake of his stenographer, but the jury evidently did not believe that. And there was reason for their not so doing aside from the positive statement in the short letter quoted which was signed and no doubt read by Pullen at the time, and that reason is found in the fact that while plaintiff's evidence was that the contract was not delivered to it until about the 23d or 24th of October, one of the notes sued on contains these indorsements:

Indorsement on principal.	Balance due on principal.
Sept. 21, 1914, $100	$500
Oct. 23, 1914, 100	400

Mr. Frost testified that he received these payments and turned them over to the plaintiff bank. There is nothing in the note to show that the principal could or was to be paid in instalments. Naturally the bank would have made some inquiry into this matter when the first payment was made had it been ignorant of the contents of the contract. But no inquiry seems to have been made. Pullen was president of the plaintiff bank and also a director of the Frost Engine Company. No doubt the jury thought he kept himself informed as to the business of both concerns, and that when he bought the notes for the bank he also received the agreement that went with them, as he says he did in his letter. It is difficult to understand how that definite statement in a letter of a few lines only, and one that involved the subject matter

of the agreement, could have been the result of the mistake of a stenographer. On the whole evidence we are satisfied with the finding of the jury on the question,—especially since it also has the sanction of the trial court.

It is evident that the notes and contract construed together, as they must be (*Thorp v. Mindeman,* 123 Wis. 149, 101 N. W. 417), rendered the notes nonnegotiable under our statute. Sub. (3), sec. 1675—1, Stats., requires a negotiable instrument to be payable "on demand or at a fixed or determinable future time." Under the contract the time of payment of the notes was uncertain and might never occur if the plant failed to earn more than needed for repairs.

By the Court.—Judgment affirmed.

MORGAN, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

February 5—March 5, 1918.

Carriers: Stoppage in transitu: Rights and liabilities of carrier: Conversion: Goods taken under legal process: Notice to owner: Bankruptcy of consignee: Summary order to take property: Jurisdiction of bankruptcy court: Collateral attack: Duty as to protecting shipper's interest: Assumption of responsibility: Estoppel.

1. Upon the exercise of the right of stoppage *in transitu* the carrier must, at its peril, deliver the goods to the person entitled to them. If in doubt, it should insist upon full investigation and may retain possession until it is satisfied; or, if both vendor and vendee are demanding the goods and threatening suit therefor, it may by interpleader compel them to settle the question between themselves.
2. Where the vendor of lumber shipped it to Chicago but, upon learning of the vendee's bankruptcy, duly stopped it in transit while it was still in Wisconsin, the carrier did not, by afterwards transferring the lumber to its station yards in Chicago, convert it or become liable to the vendor for its value, the vendor not being injured by such transfer, since the carrier did not thereby

part with possession of the lumber or render itself unable to comply with its duty to the vendor.

3. The fact, in such case, that after reaching Chicago the lumber was, pursuant to an order of the bankruptcy court, delivered to the receiver of the vendee, did not render the transfer to Chicago a conversion, since the same court might have compelled such delivery if the lumber had remained at the place of stoppage.

4. A carrier cannot be held responsible for goods taken from its custody by valid legal process, provided it gives the owner prompt notice of the suit so that he may have an opportunity to protect his interest.

5. Where the vendor of lumber stopped it in transit but, pursuant to a summary, *ex parte* order of a bankruptcy court, the carrier thereafter delivered it to the vendee's receiver in bankruptcy, such order constituted "legal process, fair on its face," relieving the carrier from liability to the vendor if the carrier promptly notified him of such action.

6. The jurisdiction of the bankruptcy court to make such summary order cannot be questioned collaterally in an action in a state court by the vendor against the carrier to recover the value of the lumber.

7. Whether a bankruptcy court has jurisdiction to proceed in a summary manner to vest its receiver with possession of property claimed to belong to the bankrupt's estate depends upon the facts disclosed by the record from time to time, and, while it may have jurisdiction to institute such proceedings, it may be ousted of such jurisdiction by a presentation of facts showing that the title to such property is claimed by another, in which case such other is entitled to have his right to the possession determined in a plenary suit.

8. Even if the order of the bankruptcy court was not "legal process, fair on its face," the delivery of the lumber to the receiver did not render the carrier liable to the vendor, since the receiver's claim of the right of possession raised a controversy which the carrier had no power to determine, and the property was not by such delivery lost to the vendor, but was turned over to a proper tribunal in which the vendor might assert his claim.

9. The carrier was not bound, in such case, to go into the bankruptcy court and establish the vendor's right to the lumber, but only to notify the vendor promptly of what had been done; and the vendor slept upon his rights by not appearing seasonably in that court to establish his claim.

10. After issue was joined in this action by the vendor against the carrier for the value of the lumber, in correspondence between

the attorneys of the respective parties it was asked on behalf of the carrier whether the vendor would settle for a certain sum if the carrier could obtain a refund of that amount from the bankruptcy court, and the reply was that the vendor would accept that amount but that, as no definite offer of settlement had been made, he would notice this action for trial and proceed as if there had been no negotiations. *Held*, that the carrier did not thereby assume responsibility for recovering the value of the lumber from the bankrupt estate, and since there was nothing to indicate that the vendor had intended to present a claim in the bankruptcy court or that his conduct was in any way influenced by the correspondence, the carrier was not estopped from contending that the vendor should have sought a remedy in said court.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

The plaintiff is a manufacturer of lumber doing business at Morgan Siding, Wisconsin, and the Esterbrook-Skeele Lumber Company is a corporation engaged in the lumber business with offices in the city of Chicago and state of Illinois. Prior to the 4th day of April, 1914, the plaintiff agreed to sell to the Esterbrook-Skeele Lumber Company a considerable quantity of lumber, to be loaded on cars at or near Morgan Siding, Shawano county, Wisconsin, on the line of the Wisconsin & Northern Railroad Company. Said lumber was thereafter loaded and billed by the plaintiff, from time to time, as directed by said lumber company. On or about the 4th day of April, 1914, at the request of said lumber company, the plaintiff, pursuant to and under said contract, loaded two cars of lumber for shipment to the said lumber company. Said cars were accepted for shipment by the Wisconsin & Northern Railroad Company at Van Ostrand, Wisconsin, and delivered to the defendant railroad company at Shawano, Wisconsin, as connecting carrier, in the usual course of transportation, for delivery to said lumber company at Chicago, Illinois. Upon the bill of lading the lumber company appeared as shipper as well as consignee, the plaintiff causing said bill of lading to be issued in

such form pursuant to the request of the lumber company. At the time of shipment said lumber had not been paid for, either in whole or in part, and both railroad companies knew that plaintiff was the manufacturer and vendor of the lumber and that he delivered the same on board said cars for shipment and caused the bills of lading to be issued as aforesaid,—all under some contract or understanding with said lumber company, the terms of which contract or understanding were unknown to said railroad companies. While said cars were *en route* and in the possession of the defendant as common carrier, and within the state of Wisconsin, the lumber company, on the 14th day of April, 1914, upon its own petition, was by the district court of the United States for the Northern district of Illinois duly adjudged a bankrupt. On the same day, upon being advised of said bankruptcy proceedings, and while said lumber was in the possession of the defendant at Butler, Wisconsin, the plaintiff exercised his right of stoppage *in transitu* in ample manner and form. The cars were held at Butler, Wisconsin, for further disposition orders. On the 20th day of April plaintiff wrote the claim agent of the defendant advising it to take disposition of the cars from Upham & Agler Lumber Company. On the 24th day of April the Upham & Agler Company wrote defendant directing it to reconsign said cars to certain named parties at Milwaukee, Wisconsin, but before receiving that letter the defendant moved said cars to Chicago, and on April 27th wrote plaintiff as follows:

"This is to advise you that we have ordered these cars to Chicago, where they will be held. The Esterbrook-Skeele Lumber Company claim ownership, and I wish you would kindly advise at once of the proof of ownership you can show for the two cars in question."

On April 28th, and before receipt of the letter of the 27th, plaintiff delivered a communication to the defendant's agent at Shawano, Wisconsin, making complaint because the cars

were not delivered to the parties at Milwaukee, and notifying the defendant that it would be held liable for the value of the lumber. On April 29th attorneys for plaintiff replied to the letter of the 27th inclosing a copy of the letter delivered to the agent at Shawano on the 28th, and further stating:

"As you have ordered these cars to Chicago, after instructions from *O. E. Morgan* to deliver them to his customers at Milwaukee, there is nothing for us to do except to hold you for the value of these cars. We shall accordingly bring suit against you for their value. You should at least have extended to us the courtesy of holding these cars in Wisconsin pending further advice from *Mr. Morgan.*"

On the 27th of April defendant caused the cars to be shipped from Butler, Wisconsin, to its Mayfair station yards at the city of Chicago to be there held for further orders.

Upon the arrival of said lumber in Chicago the receiver in bankruptcy made demand upon the defendant for the possession thereof. The defendant refused to deliver same to said receiver. Thereupon, and on the 28th day of April, the United States district court for the Northern district of Illinois (the bankruptcy court) made and entered an *ex parte* order requiring the defendant to deliver said lumber to the receiver in bankruptcy. Pursuant to said order the lumber was delivered to the receiver. The plaintiff thereupon brought this action to recover the value of the lumber, and from a judgment in favor of the defendant plaintiff appealed.

For the appellant there was a brief by *Eberlein & Larson* of Shawano, and oral argument by *Albert S. Larson.*

R. N. Van Doren of Milwaukee, for the respondent.

OWEN, J. Conceding plaintiff's right of stoppage *in transitu,* defendant's liability must be predicated on some

breach of duty that it owed the plaintiff. This is conceded by the plaintiff, who asserts that the shifting of the lumber from Butler to Chicago constituted a conversion thereof, and that if such transfer did not constitute conversion then the defendant converted it when, in the face of the claim of title thereto by the plaintiff, it delivered the lumber to the receiver in bankruptcy pursuant to the order of the United States district court for the Northern district of Illinois.

Upon the exercise of the right of stoppage *in transitu* the carrier thereafter acts at its peril in its disposition of the goods stopped. It must deliver the goods to the person entitled to them. If it wrongfully deliver either to the vendor or the consignee it will be liable in damages to the other. If the carrier is in doubt as to whom it should deliver the goods to it is its right, as well as its duty, to insist upon full investigation of all the facts that go to the right of the seller to stop the goods, and it may retain the property in its possession until it is satisfied. 2 Michie, Carriers, §§ 1713–1719; Hutchinson, Carriers, § 421; Van Zile, Bailments & Carriers, § 592. Should the carrier be unable to determine who is entitled to delivery, and both the vendor and the vendee are demanding the goods and threatening to bring actions against it to recover, then the carrier would no doubt have the right to file a bill of interpleader in an equity court and compel the parties to settle the question between themselves. Van Zile, Bailments & Carriers, § 592; Hutchinson, Carriers, § 422. It has been said that after notice of stoppage the carrier occupies the position of stakeholder between the parties. 2 Rorer, Railroads, p. 1339.

With these principles in mind we proceed to examine the situation to ascertain if the carrier breached its duty to the plaintiff in any respect. As already stated, plaintiff claims that the transfer of the lumber from Butler to Chicago constituted a conversion thereof on the part of the railroad com-

pany. We fail to appreciate the force of the logic supporting this conclusion. By such transfer the carrier did not part with the possession or control of the lumber or place it beyond its power to comply with its duty to the plaintiff. It could as well have made delivery, pursuant to plaintiff's directions, from Chicago as from Butler. If defendant eventually failed or refused to make disposition as directed by plaintiff, the fact that the lumber was held in Chicago instead of Butler would in no manner affect plaintiff's rights. Neither was plaintiff prejudiced by such removal so far as the action of the bankruptcy court is concerned. It is conceded that the *Chicago & Northwestern Railway Company* had officers and agents domiciled at Chicago upon whom service of process issued by the bankruptcy court easily could have been made. In other words, it was an easy matter for the bankruptcy court to acquire personal jurisdiction of the defendant railroad company, and by so doing it could have compelled the delivery of the lumber, wherever it might have been physically located, to the receiver in bankruptcy. What subsequently happened could have occurred as easily and with the same consequences if the lumber had remained at Butler. We are not only unable to construe the transfer of the lumber from Butler to Chicago as an act of conversion, but we fail to perceive how plaintiff was injuriously affected thereby.

We come now to the question of whether the railroad company was justified in turning the lumber over to the receiver under the order of the bankruptcy court. The carrier cannot be held responsible for goods taken from its custody by valid legal process provided it gives the owner prompt notice of the suit so that he may have an opportunity to protect his interest. If the carrier gives such notice and the consignor fails to appear or fails in his defense and the property is seized, held, or sold under judicial process, the carrier can-

not thereafter be held responsible for yielding to what must then be treated as *vis major*. *Wells Fargo & Co. Express v. Ford,* 238 U. S. 503, 35 Sup. Ct. 864; 10 Corp. Jur. 280.

Plaintiff concedes the above principle, but claims that the order of the bankruptcy court does not constitute "legal process, fair on its face." This raises a question calling for careful consideration.

"There are two classes of cases arising under the act of 1898 [federal bankruptcy act] and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation." *Babbitt v. Dutcher,* 216 U. S. 102, 30 Sup. Ct. 372.

It is contended by the plaintiff that, under the circumstances, the bankruptcy court was without jurisdiction to proceed in a summary way to vest the receiver with the possession of the lumber; that, the bankruptcy court being without jurisdiction to act summarily, its order was wholly void and affords no protection to the railroad company for delivering the lumber to the receiver. The question naturally arises, By whom and how and when is it to be determined whether the bankruptcy court had jurisdiction to make the order upon which the defendant relies? Manifestly it is a question calling for judicial determination. It

cannot be determined by the person to whom the order is addressed. It must be determined by the court issuing the order, and it is reasonable to conclude that the act of issuing the order is tantamount to a determination that it had jurisdiction so to do. Obviously such determination must be based upon the evidence then before the court, and it cannot be presumed in an action such as this, where the validity of that order is collaterally questioned, that the court did not have before it, upon the face of the record, facts sufficient to confer jurisdiction—if indeed that question can be considered at all in a collateral attack upon the validity of the order.

Plaintiff's attorney contends very forcibly that, under the facts existing, the bankruptcy court did not have jurisdiction to make the order in question. The trouble is, his contention is not made in the proper forum. We are quite convinced that if he had made his contention in the bankruptcy court that court would have released its jurisdiction. That was the proper place, and the only place, to raise the question. It might have well happened that at the time of the issuance of the order the court, upon the facts then before it, had jurisdiction to make the order, of which jurisdiction it might have been ousted by the further presentation of facts relating to the title of the lumber which plaintiff could have brought to the attention of the court. Thus, in *In re Blum,* 202 Fed. 883, decided by the circuit court of appeals for the Seventh circuit, it is said by KOHLSAAT, J.:

"The only question presented is whether petitioner's answer sets up an adverse claim within the meaning of the bankruptcy act. If it does, then petitioner is entitled to have it adjudicated in a plenary suit. . . . On a petition to review, this court can pass only upon errors of law. We are therefore limited to the inquiry as to whether the conclusions of law of the referee and the district court are sustained by their conclusions of fact, or whether, when petitioner set up in her answer that she was in possession of and claimed as

her own the said money, she did not in fact state a case which *ousted the summary jurisdiction of the court.*"

In concluding a very able opinion upon the questions presented the learned judge said:

"We believe the true rule to be . . . that where a party in possession sets out in his answer facts which, if true, would constitute an adverse title, the court may not in a summary proceeding, and against his protest, dispose of his rights in property. It therefore follows in the present case that petitioner was entitled to have her claim adjudicated in a plenary suit. The decree of the district court must be reversed, with direction to vacate the same and *release further jurisdiction of the summary proceeding.*"

The clear inference from this decision is, that whether the bankruptcy court had jurisdiction to proceed in a summary manner to vest its receiver with possession of property claimed to belong to the bankrupt's estate depends upon the facts disclosed by the record from time to time, and that while it may have jurisdiction to institute such plenary proceedings, it may be ousted of such jurisdiction by a presentation of facts showing that the title to such property is claimed by another, in which case such other is entitled to have his right to the possession thereof determined in a plenary suit.

We are of the opinion that the order made by the bankruptcy court, under which the railroad company delivered the lumber in question to the receiver in bankruptcy, must take rank as "legal process, fair on its face;" that the railroad company was justified in making the delivery of the lumber to the receiver in bankruptcy in obedience to such order; that the only duty it owed the plaintiff was to notify him of such action, which it did, and that, as a consequence, the defendant is not liable to the plaintiff in this action.

We think, however, that if the order in bankruptcy could not be classed as "legal process, fair on its face," the same conclusion with reference to the liability of the railroad com-

pany would have to be reached, for the reason that the action of the railroad company in delivering the property to the receiver in bankruptcy was *damnum absque injuria* so far as the plaintiff is concerned. It was apparent that the receiver in bankruptcy claimed the right of possession of the lumber. This claim raised a controversy which the railroad company had no power to determine, and no principle of justice required it to determine at its peril whether the plaintiff or the receiver in bankruptcy was entitled to the possession thereof. Under such circumstances, as above indicated, it was entitled to have the controversy between plaintiff and the receiver in bankruptcy settled by some court of competent jurisdiction. The bankruptcy court was such a court, and the effect of turning the lumber over to the officer of that court was to substitute a stakeholder with power to determine authoritatively the dispute between the parties—the bankruptcy court—for a stakeholder who did not have such power—the railroad company. The property was not lost to the plaintiff by delivery to the receiver in bankruptcy. Bankruptcy courts generously recognize the right of stoppage *in transitu* (*In re Manuel J. Portuondo Co.* 135 Fed. 592; *Pridmore v. Puffer Mfg. Co.* 163 Fed. 496; *In re Allen,* 178 Fed. 879; *In re White,* 205 Fed. 393); and if he was legally entitled to the lumber the bankruptcy court was a very proper tribunal in which to establish such claim.

Furthermore, we do not think any principle of justice or equity required the railroad company to go into the bankruptcy court and establish plaintiff's right to the lumber. The railroad company did not have the facts at hand to make proper proof of plaintiff's title and, at the best, it could do no more than to advise the court of the claims made by plaintiff in this respect. The law contemplates that such contests shall be made by the vendor himself, and to secure him in this right it lays upon the carrier the duty of promptly notifying him of the institution and pendency of proceedings

adverse to his claim of title. We think it plain, in any view that may be taken of this case, that the plaintiff slept upon his rights in not appearing seasonably in the bankruptcy court and there establishing his title to and right of possession of the lumber in question.

There is another contention made by the plaintiff which remains to be disposed of. Plaintiff contends that the defendant assumed responsibility for recovering the value of the property from the receiver in bankruptcy and is, therefore, estopped from contending that plaintiff should have sought that remedy. This contention is based upon correspondence occurring between the attorneys for the plaintiff and the railroad company. On September 24, 1914, the attorney for the railroad company wrote plaintiff's attorneys asking what plaintiff would take to settle the case, stating,

"It may be that I could make some progress with an application to the federal court for relief provided I could make settlement with you. In view of the fact that you have taken issue with the facts set forth in my answer, the trial of the case may be somewhat expensive, and I think you should consider the possibility of our having a defense and be willing to make us a reasonable proposition which might enable us to work out a settlement of the matter."

In reply to this letter plaintiff's attorneys wrote the attorney for the defendant on September 25th, reviewing the situation somewhat, concluding by saying,

"If you will write us offering to pay $395.66 in payment of the claim of *Mr. Morgan* we will submit it to him with recommendation that he accept it. If he shall refuse to accept it we agree that the offer shall be eliminated from the case."

On September 26th the attorney for the railroad company acknowledged receipt of this letter and said:

"I am going to do everything I can to get bankruptcy estate to refund us $395.66. I will proceed at once along this line. I wish, however, you would get definite authority

from *Mr. Morgan* to settle the case for this amount. Your letter leaves it in such shape that I could not make definite propositions to the federal court, although I do not doubt but what your client would accept your recommendation. Anything you will offer or promise to do in this matter will be treated as confidential and will not prejudice you in case we fall down. I wish, therefore, you would wire me that you have authority to settle for $395.66. I think with a little co-operation we will be able to dispose of this matter without any litigation."

On September 28th plaintiff's attorneys replied to this letter as follows:

"We have your letter of the 26th, and after getting in touch with *Mr. Morgan* obtained his consent to settle for $395.66, and we have just wired you as follows: 'Have authority *Morgan* to settle for $395.66.' As your letter is not a definite offer of settlement on this basis, we will serve notice of trial on you, as we desire to get the case on the November calendar for trial in the event that you should not conclude to settle on the basis indicated."

This correspondence was had after issue was joined in the case and as the time for trial was approaching. It does not appear that this correspondence modified plaintiff's plans in the least. In the first place there is nothing to indicate that the plaintiff had any intention whatever of presenting a claim in the bankruptcy court. The thought that the bankruptcy court might refund the amount secured upon a sale of the lumber seems to have occurred to the attorney for the railroad company, and in the hope that, by pressing a claim in that court, the trial of this case might be avoided, he entered upon this correspondence with a view of securing an offer of settlement for $395.66, the amount realized on the sale of the lumber, from the plaintiff. The only thing plaintiff did was to offer to settle the case for $395.66 as appears by the letter of September 28th. It was thoroughly understood that the railroad company had not offered to pay $395.66 in settlement, and because it had not done so plaint-

iff proceeded with the service of notice of trial. It is well settled that parties to litigation may negotiate for a settlement of their differences without prejudice to their rights. The essence of this correspondence was: the railroad company made inquiry whether *Morgan* would settle for $395.66 if the railroad company could secure a refund of that amount from the bankruptcy court. The plaintiff said that he would accept such amount in settlement, but, as the railroad company had not made a definite offer of settlement, he would serve notice of trial and proceed as though no negotiations had been entered upon. It very clearly appears that plaintiff's conduct was in no manner influenced by this correspondence. He had determined to hold the railroad company, and there is nothing to indicate any purpose on the part of the plaintiff to press his claim in the bankruptcy court. We think the decision of the trial court was right, and that the judgment appealed from must be affirmed.

By the Court.—Judgment affirmed.

SHARPLEY, Respondent, vs. CITY OF OCONTO, Appellant.

February 5—March 5, 1918.

New trial: Improper argument to jury.

In an action against a city for personal injuries caused by an obstruction on a sidewalk, an order of the trial court granting to plaintiff a new trial on the ground that defendant's counsel had been allowed to use and did use improper argument to the jury, is affirmed.

APPEAL from an order of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

The appeal is from an order granting a new trial.

The cause was submitted for the appellant on the brief of

Frank P. Megan of Oconto, and for the respondent on that of *Classon & Whitcomb* of Oconto.

ESCHWEILER, J. By answers to appropriate questions of the special verdict the jury found that the defendant city was negligent in the care of one of its sidewalks, causing plaintiff's injury, and that the plaintiff himself, by his negligence, proximately contributed to the same injury.

There is evidence to support both of these findings, but not of such a nature that the court below could properly dispose of the case without the aid of a verdict.

During the argument to the jury the then but not present counsel for the city stated in substance "that if anybody else in the city of *Oconto* had fallen over the fountain base [being the obstruction on the sidewalk complained of] that they would have had them here to testify." Plaintiff's counsel excepted to such statement and the objection was overruled. No reference to this matter was made by the court in his charge to the jury.

Upon plaintiff's motion the verdict was set aside and a new trial granted, costs to abide the event of the action, on the ground that the defendant's counsel was allowed to use and did use improper argument to the jury, but not specifying what such argument was.

It is frankly conceded by defendant's counsel that the above quoted statement made to the jury was improper in that testimony along the line so suggested could not have been properly received over objection. If nothing more was said during the argument to the jury on this point than what appears in the record before us and that we have quoted, it might well have been held a nonprejudicial error, for as it stands it might be applicable to the question of defendant's, as well as of plaintiff's, negligence; but giving the required deference and weight that we must to the ruling of the court below and the natural inference that after such a ruling more argument on the same line was indulged in by ever-

zealous counsel, we cannot say that the determination by the trial court that a new trial was required lest injustice should be done can be reversed.

By the Court.—Order affirmed.

MARSHALL-JACKSON COMPANY, Appellant, vs. JEFFERY and another, Respondents.

February 5—March 5, 1918.

Workmen's compensation: Illinois statute: Liability of third person for injury: Subrogation of employer or insurer to employee's right of action: Parties.

1. Under sec. 29 of the Illinois workmen's compensation act, where the injury or death of an employee for which compensation is payable under the act was not caused by negligence of the employer or his employees, and a third person is legally liable therefor, the employer is merely subrogated to the right to enforce the claim of the employee or his personal representative against such third person, and the amount recovered is to be apportioned as therein prescribed. No such right of action is vested in the employer as would pass by subrogation to an insurer of the employer against loss under the compensation act; hence, although the insurer has paid the amount of compensation which was payable under the act, the employer is the proper party to prosecute the action to enforce the legal liability of said third person to the employee or his personal representative.
2. A policy insuring an employer against loss arising out of injuries to his employees is in the nature of accident insurance and unless it is expressly made an indemnity contract the insurer is not subrogated to the rights of the insured against third persons whose negligence caused an injury.

APPEAL from an order of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

The appeal is from an order overruling plaintiff's demurrer to parts of defendants' answer to the amended complaint.

The complaint of the plaintiff states that the defendants are owners of a large building in Chicago, Illinois, in which the plaintiff had leased and still occupies rooms as a tenant;

that defendants had equipped the building with patent window-cleaning devices to be used by the plaintiff and other tenants in the building; that said devices were unsafely constructed; that one John Mantello, an employee of the plaintiff, on April 27, 1915, attempted to use the window-cleaning devices, and as a result of their dangerous and insecure character the devices were pulled out of the window shafts or frames, precipitating John Mantello from a fourth-floor window to the ground; that he suffered a fractured skull and other injuries, from which he died an hour later. The complaint alleges that the unsafe and dangerous character of the devices was known, or by exercise of due care should have been known, to the defendants. The complaint further alleges that the plaintiff and John Mantello, as plaintiff's employee, were subject to the provisions of the workmen's compensation act of Illinois; that under this act plaintiff became liable as employer and has been compelled to pay to the widow of John Mantello the amount of $2,500, and it therefore demands judgment against the defendants for that sum and its costs.

A second cause of action is alleged under the provisions of an ordinance of the city of Chicago which provides that the owner or agent of every building embraced in the ordinance shall equip every window of the building above the first story with safety devices which will permit the cleaning of the exterior of each and every window above the first story without danger to the person doing the work.

A third cause of action alleged that under an Illinois statute the personal representative of Mantello is entitled to bring an action for the benefit of the widow for the wrongful killing of Mantello, and that under the workmen's compensation act the plaintiff is subrogated to the rights of the widow and the representative of Mantello for the recovery of damages proximately caused by the wrongful and negligent action of defendant resulting in Mantello's death.

A fourth cause of action is a repetition of the third, with additional allegations of defendant's liability under the Chicago ordinance set forth in the second cause of action.

To each cause of action defendants interposed a general demurrer. This demurrer was noticed for hearing, but was withdrawn before decided and an answer served. The answer alleges that the plaintiff ought not to have this action against defendants because the *Marshall-Jackson Company* and John Mantello were operating under the workmen's compensation act of the state of Illinois; that at some time subsequent to the date of the alleged accident to John Mantello the widow of John Mantello made claim against the plaintiff under the provisions of the act; that the plaintiff was insured under a contract with the Ben Franklin Mutual Casualty Company by which the casualty company agreed to indemnify, save, and hold harmless the plaintiff against any damages and loss and to pay any and all liabilities arising out of or resulting to plaintiff's employees from injuries of the kind and nature alleged in the complaint; that the Ben Franklin Mutual Casualty Company did pay the claim of the widow of John Mantello against the *Marshall-Jackson Company* to the amount of $2,500; that that amount was all the widow was entitled to receive under the workmen's compensation act of Illinois; that the sum of $2,500 so paid by the Ben Franklin Mutual Casualty Company for the benefit of the widow of John Mantello is the identical sum of money which the plaintiff is attempting to recover from the defendants in this action.

The defendants also alleged other defenses which need not be stated for the purposes of this appeal.

The plaintiff demurred to the part of the answer alleging that the $2,500 paid by the Ben Franklin Mutual Casualty Company for the benefit of the widow of John Mantello is the identical sum of money sued for by the *Marshall-Jackson Company,* on the ground that the allegations do not

state facts sufficient to constitute a defense. The demurrer was overruled by the court. An amended complaint was served by the plaintiff on November 8, 1916, which is identical with the original complaint with the exceptions that a copy of the workmen's compensation act of Illinois is attached, as well as of the Chicago ordinance, with the additional allegation that the defendant at the time of the injury to Mantello had elected to be governed by the Illinois compensation act.

The part of the Illinois workmen's compensation act material to the issue presented by the answer and plaintiff's demurrer thereto and involved in this appeal is as follows:

"§ 29. *Where injury caused under circumstances creating a legal liability in some person other than the employer.* Where an injury or death for which compensation is payable by the employer under this act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this act, then the right of the employee or personal representative to recover against such other person shall be subrogated to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this act, by reason of the injury or death of such employee. Where the injury or death for which compensation is payable under this act was not proximately caused by the negligence of the employer or his employees and was caused under circumstances creating a legal liability for damages on the part of some person other than the employer to pay damages, such other person having elected not to be bound by this act, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this act, but in such case if the action against such other person is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other per-

son, either with or without suit, then from the amount received by such employee or personal representative there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative: Provided, that if the injured employee or his personal representative shall agree to receive compensation from the employer or to institute proceedings to recover the same or accept from the employer any payment on account of such compensation, such employer shall be subrogated to all the rights of such employee or personal representative and may maintain, or in case an action has already been instituted, may continue an action either in the name of the employee or personal representative or in his own name against such other person for a recovery of damages to which but for this section the said employee or personal representative would be entitled, but such employer shall nevertheless pay over to the injured employee or personal representative all sums collected from such other person by judgment or otherwise in excess of the amount of such compensation paid or to be paid under this act and all costs, attorneys' fees and reasonable expenses incurred by such employer in making such collection and enforcing such liability." [Hurd's R. S. 1915–16, ch. 48, § 152*b*.]

The answer to the amended complaint is identical with the answer to the complaint and is demurred to in the same manner.

The demurrer was overruled on January 4, 1917, from which order this is an appeal.

The cause was submitted for the appellant on the briefs of *Joseph R. Clarkson* of Kenosha, attorney, and *Samuel A. Harper* of Chicago, of counsel, and for the respondents on the brief of *Cavanagh, Barnes & Cavanagh* of Kenosha, attorneys, and *Calhoun, Lyford & Sheean* of Chicago, of counsel.

SIEBECKER, J. The contentions of the appellant on this appeal involve the rights of the parties to the action under sec. 29 of the workmen's compensation act of Illinois, set out

in the foregoing statement. The provisions of this section show a clear legislative intent to fix the rights of employees and employers to the damages recoverable for personal injuries to employees against persons other than the employer who are legally liable to the injured employee or his personal representative. When the employer, the employee, and the third person legally liable to the injured employee *are all subject to this compensation act,* then the right to damages by the employee or his personal representative against such other person "shall be subrogated to his employer" and the employer may prosecute an action against such other person "to recover such damages sustained," the amount thereof being limited to the aggregate amount of compensation payable. When, however, the third person who is legally liable to the injured employee or his personal representative *is not subject to the compensation act,* then an action may be prosecuted against such other person legally liable in damages to the injured employee or his personal representative by the injured employee or his personal representative, but if such employee or his personal representative have accepted or agreed to accept compensation, then the "employer shall be subrogated to all the rights of such employee or personal representative" and may sue in his name or in the name of the employee or his personal representative to recover such damages, but of the damages so collected by the employer, any sum in excess of the compensation, costs, attorneys' fees, and expenses incurred by him he is required to pay to the injured employee or his personal representative.

We have not been favored with any decision of the courts of Illinois dealing with this statute and the question involved here. It is manifest from the provisions of the act that the legislature intended that the legal rights of the employee or his personal representative arising from acts of negligence of other persons than the employer proximately causing the employee damages should not be affected by the

provisions of the compensation act, except that the employer is subrogated to the right to recover such damages for the purpose of applying such damages in payment of the compensation paid by the employer and to receive and account for all sums he received in excess thereof to the employee or his personal representative. This object of the legislature conflicts with a claim that an insurer of the employer becomes subrogated to any right to any such damages upon payment under the contract of insurance to the employer of the amount of its liability. It is manifest that the right the employer acquires to the injured employee's right to such damages contemplated by the act is the right to enforce the employee's claim against such other person for the benefit of himself and the employee, and that they are to be applied in payment of the compensation provided for in the act, and any excess is the property of the employee or his personal representative. Under these conditions and relations of the parties the employer has and acquires no rights of action against the third party liable to the employee, but is simply subrogated to the right of enforcing the employee's claim and to distribute the amount recovered between the employer and employee as prescribed by the compensation act. This right does not vest in the employer any such right of action which can pass by subrogation to an insurer of the employer for saving him harmless from loss under the compensation law. The United States circuit court of appeals for the Eighth circuit, in considering the rights of persons covered by the provisions of the Nebraska compensation act under circumstances similar to those involved here, expresses the view that the cause of action of the employer against such third person under such a subrogation must be treated as if it were prosecuted by the injured employee or his personal representative. *Otis E. Co. v. Miller & Paine,* 240 Fed. 376.

Another aspect of the case is presented by the fact that the insurance carried by plaintiff in the Ben Franklin Mutual

Casualty Company to protect itself against loss arising out of or resulting from injuries to its employees in the course of their employment, is in its nature accident insurance. Under insurance contracts of this class the insurer is not subrogated to the rights of the insured against third persons whose negligence caused the injury for which the insurer has been held liable under such policy. In *Gatzweiler v. Milwaukee E. R. & L. Co.* 136 Wis. 34, 116 N. W. 633, this court, speaking on this subject, declared:

"We . . . hold that such a policy is an investment contract giving to the owner or beneficiary an absolute right, independent of the right against any third party responsible for the injury covered by the policy; . . . that in the absence of a feature expressly making the policy of insurance an indemnity contract, it should not be regarded as such, but held to be an investment contract in which the only parties concerned are the insurer and the assured or the beneficiary."

In *Suttles v. Railway M. Asso.* 156 App. Div. 435, 141 N. Y. Supp. 1024, it is held that such insurance contracts are not contracts of indemnity only, and that the right of subrogation as contended for by the defendants here does not apply. *McAdow v. K. C. W. R. Co.* 96 Kan. 423, 151 Pac. 1113. See, also, note to the *Gatzweiler Case, supra,* in 18 L. R. A. N. S. 211.

It follows upon the foregoing considerations that the plaintiff is the proper party to prosecute this action under the Illinois compensation act and that it can enforce the rights of the personal representative of the injured employee against the defendants under the facts and circumstances stated in the pleadings, and that the trial court erred in overruling the plaintiff's demurrer to the part of the defendants' answer embraced in the demurrer.

By the Court.—The order appealed from is reversed, and the cause remanded to the circuit court with directions to enter an order to sustain the plaintiff's demurrer to the paragraph numbered "I" of the defendants' answer to the amended complaint.

HIMSTREET, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

February 6—March 5, 1918.

Carriers: Injury to person at station to meet passenger: Licensee: Safety of premises: Stairway in waiting room: Negligence: Contributory negligence: Questions for jury.

1. One who was in the waiting room of a railway station in good faith, reasonably expecting the arrival of her son on a train, was not a mere licensee although no definite time or particular train was fixed for the son's arrival, and the railway company owed to her the duty of constructing and maintaining the premises in a reasonably safe condition.
2. Where plaintiff while so in defendant's waiting room went to a window which gave a convenient view of the trains and, after looking to see if her son was on an incoming train, in stepping back fell down a lighted stairway the top of which was close by, the questions as to defendant's negligence and plaintiff's contributory negligence were both for the jury, in view of the location of the window and its surroundings.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

The appeal is from a judgment dismissing plaintiff's complaint.

The plaintiff arrived on March 16, 1916, in the forenoon, at defendant's depot in the city of Kenosha. Defendant maintains a double-track system through the city of Kenosha, the north-bound trains running on the west of such tracks. Passengers arriving, as did plaintiff, on a north-bound train step upon a platform on the west side of the tracks and from there down a flight of stairs and on to the east side through a tunnel under the two tracks and into the basement of the main depot. From this basement flights of stairs lead to the first floor of the depot, one such flight leading to the apartment set aside as the men's waiting room and the other to the women's waiting room. Plaintiff, a stranger to the city, went up the flight of stairs leading to the men's room and from there out of the building to the

hotels in the neighborhood and returned to the women's waiting room.

Plaintiff had come to Kenosha in response to a long-distance telephone message that she had received at her home in Iowa from her son, apparently at some other point in Iowa, requesting her to meet him at Kenosha, no definite time having been fixed for his arrival there, and he did not arrive until the following day. This women's waiting room was about twenty-three feet by twenty feet in size. On the west of the room, being the track side, was a door about three feet away from the north wall and leading out onto the platform. It was three feet four inches wide, with a transom above, and apparently, from a photograph taken the day after the accident, it swung, when opened, against the radiator which was against the same wall and three feet three inches south of this door. The radiator was three feet ten inches long, and directly above it was a window three feet ten inches wide and eight feet high. A little less than three feet south of this window was another window about the same size and directly over the stairway. Near the top of this west wall were four small windows fifteen by fifteen inches. The south end of the radiator extended to practically the outer edge of the top step of the stairs which led straight down to the subway, which was about eleven feet below the level of the waiting-room floor. This stairway was of white enamel with a light over the south end. A railing ran along the east edge of the stairway in the waiting room, and against that were placed benches. The plaintiff was seated near the east wall of the waiting room about opposite the center of the stairway, so that the same was within range of her vision.

Upon hearing the noise of an approaching train she arose and walked across the waiting room to the west wall for the purpose of seeing if her son was on the coming train. Several persons were occupying the open doorway and she went

and looked out of the window which was directly over this radiator, and stood south of the center of the window and therefore near the south end of the radiator. As the train passed by the depot she turned slightly in order to look further down the track, and, stepping back after having so looked, fell down the stairway, receiving severe injuries.

The special verdict of the jury found that the waiting room was not in a reasonably safe condition for public use at the time in question and that such condition was the proximate cause of plaintiff's injury; that there was no contributory negligence on plaintiff's part, and assessed her damages.

After motions by both parties upon such verdict the court changed the answers of the jury to the questions as to defendant's and plaintiff's negligence and directed judgment for the defendant upon the evidence notwithstanding said verdict, and from the judgment so entered the plaintiff appeals.

Calvin Stewart of Kenosha, for the appellant.

R. N. Van Doren and *Charles H. Gorman* of Milwaukee, for the respondent.

ESCHWEILER, J. The plaintiff was lawfully on the defendant's premises at the time of the injury while expecting the arrival of her son as a passenger on one of defendant's trains. While she occupied such a position to the defendant company it owed to her the duty of constructing and maintaining the premises in a reasonably safe condition, as was correctly said by the court in his charge to the jury. *Otto v. M. N. R. Co.* 148 Wis. 54, 134 N. W. 157; *Banderob v. W. C. R. Co.* 133 Wis. 249, 113 N. W. 738. There was no error, therefore, in refusing to instruct the jury, as requested by the defendant, that she was there as a mere licensee. That there was no definite time or particular train fixed for her son's arrival did not alter her position; she was in good faith reasonably expecting him at the time of the injury.

We are satisfied from a consideration of the evidence in this case and the surrounding situation and circumstances that the court was correct in its first view of this case when submitting to the jury both questions as to negligence, and that the evidence was sufficient to support the findings made by the jury.

It cannot be said as a matter of law that the situation then provided by the defendant was such that the plaintiff was making an improper use of the window, it being so located that it gave a convenient view of the incoming trains, or that some such use ought not to have been anticipated by the defendant. The combination made there of the window, the door swinging in and against the radiator, which was placed just at the top of the long stairway leading into the subway and squarely in front of the window, may well be held to be such a combination as would properly permit the jury, within the wide field it has for its province, to say that persons chargeable with such a combination ought reasonably to have anticipated that some injury might occur to a person while properly using the window. Neither can we say as a matter of law that even though the stairway was well lighted and in plain sight the presence of such stairway in proximity to the window could not, within the field of ordinary care, have been overlooked or momentarily forgotten by a stranger to the premises and one whose attention was drawn to what was going on outside of the window, as in plaintiff's case.

We think the questions here, both of defendant's negligence and plaintiff's contributory negligence, are disposed of adversely to defendant's contention and contrary to the view that was finally taken by the trial court by a case which had not been decided at the time of the trial of the case at bar. *Hommel v. Badger State I. Co.* 166 Wis. 235, 165 N. W. 20.

The defendant suggests that error was committed on the trial by the admission of certain evidence with reference to accidents occurring on these stairways prior to the one

plaintiff received, but we are satisfied from an examination of the entire record on that subject that there was nothing done in that respect requiring a change in the result arrived at here, or further comment.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment for the plaintiff upon the verdict of the jury.

WILL OF BROOKS: BROOKS, Appellant, vs. SCHWARTZ and another, Respondents.

February 6—March 5, 1918.

Wills: Construction: Devise of homestead to wife: Fee simple or life estate?

By his will a testator gave to his wife "the homestead now occupied by me, with all furniture and all belongings thereto, for her sole use and benefit," and in the same paragraph directed that there should be paid to her $1,000 yearly "for her support during her lifetime." After another bequest he gave "all the rest, residue, and remainder of my estates, both real and personal," to his son. At the time of making the will the testator had no real estate other than the homestead. *Held*, that under sec. 2278, Stats. (providing that every devise of land shall be construed to convey all the estate of the devisor which he could lawfully devise, unless it shall clearly appear by the will that he intended to convey a less estate), the wife took the homestead in fee and not merely a life estate therein.

APPEAL from a judgment of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Affirmed.*

The appeal is from a judgment dismissing appellant's petition.

On May 27, 1908, Homer Brooks, father of the appellant, in due form made his last will, the essential parts of which are as follows:

"First. After the payment of my just debts and funeral expenses I give, devise and bequeath to my wife, Almina, the

homestead now occupied by me, with all furniture and all belongings thereto, for her sole use and benefit, and I further will and direct that there shall be paid from my estates to my wife, Almina, the sum of one thousand ($1,000) dollars yearly, for her support during her lifetime.

"Second. I give, devise and bequeath to my daughter, Emma C., wife of *Henry Schwartz,* the sum of $4,000.

"Third. All the rest, residue and remainder of my estates, both real and personal, after the payment of all legacies and expenses above mentioned, I give to my son, *William Brooks.*

"Fourth. I hereby nominate and appoint my son, *William Brooks,* and my son-in-law, *Henry Schwartz,* the executors of this my last will and testament, without bonds being required of them."

Below the attestation clause and after the will had been executed there was added in the testator's own handwriting and signed by him a clause which, as well as it can be made out, reads: "I further give Almina my wife Hold Hous and contets durings her lief time to hold a she wishes." In July, 1913, the will was admitted to probate, the court then holding expressly that this added clause was no part of the will, and no appeal was taken from such order. The petitioner, residuary legatee under the will, as well as one of the executors, joined in an application with his co-executor for the allowance of their final account for final distribution of the estate and that said will be construed in such final order or judgment. Upon the hearing of such application on April 14, 1914, the petitioner, *William Brooks,* not being present, the court construed the first paragraph of the will to give to the widow the homestead in fee. The widow died July 19, 1916, and in September, 1916, the petitioner applied to the probate court to have such final proceedings reopened and a determination made that the widow received under the will but a life estate in the homestead. The petitioner also stated grounds relied upon by him as excusing his delay in applying for such relief.

The petition was dismissed by the county court and by the

circuit court on appeal, and from such judgment of the circuit court this appeal was taken.

The cause was submitted for the appellant on the briefs of *Ernst Merton* of East Troy, and for the respondents on that of *George W. Waller,* attorney, and *Simmons & Walker,* of counsel, all of Racine.

ESCHWEILER, J. If the courts below were correct in the construction of the last will of Homer Brooks, the other features of the petition need not be considered.

The learned and able counsel for the petitioner insists that the first paragraph of the will in question should be construed as giving but a life estate to the widow and the fee to the petitioner as residuary devisee. He contends that the facts and circumstances surrounding the testator at the time of the making of the will disclose that the petitioner had lived with his father and mother and assisted in taking care of the farm that they owned and occupied near East Troy, and all without any express provision for compensation other than the understanding that he was to be ultimately compensated for such services; that the farm had been disposed of several years prior to the making of the will; that the father and mother had then purchased and moved to the homestead in question in the village of East Troy; and that the testator had no other real estate at the time of the execution of the will than this homestead; and from these facts and the language of the will itself he argues that the reference to "real" estate in the third paragraph of the will must necessarily be construed as referring to the fee of the homestead, or that otherwise it is meaningless. It is also urged that the words "during her lifetime," at the end of the first paragraph, should be properly construed as referring to the gift of the homestead to the wife as well as to the yearly allowance of $1,000.

Controlled by the rule that by sec. 2278, Stats., it is the

duty of the court to construe every devise of land as conveying the devisor's entire estate therein unless it shall clearly appear by the will that a lesser estate was intended (*Will of Weymouth,* 165 Wis. 455, 161 N. W. 373), and giving full weight to the various suggestions made, we are constrained to hold that from within the four corners of the will it plainly appears that there was intended a gift of the fee in the homestead to the widow and not a lesser estate, and that to hold otherwise would be doing violence to the recognized canons of construction for such documents. It follows therefrom that the judgment must be affirmed.

By the Court.—The judgment of the circuit court is affirmed.

HUME, Respondent, vs. CITY OF CHILTON, Appellant.

February 6—March 5, 1918.

Municipal corporations: Sewers: Inadequacy: Flooding of basement: Contributory negligence.

One who knew that a surface-water sewer was inadequate and that in times of storm water was likely to back up and flood his basement through a connection which he had himself made with the sewer, but did nothing to protect his premises although he might easily have installed a device which would have prevented such flooding, was guilty of contributory negligence precluding a recovery for damages caused by the backing up of the water into his basement.

APPEAL from an order of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Plaintiff is a property owner in the city of *Chilton.* In 1898 he owned and occupied, as a dwelling, property situated at the northwest corner of the intersection of State and School streets in said city. At that time plaintiff and two others went before the street committee and members of the common council and offered to pay a certain share of the expense

of constructing a sewer from the northwest corner of the intersection of Church street to the river if they would be allowed to connect with it and drain their cellars. This proposition was accepted and the sewer was built on the west side of State street as far north as the northwest corner of the intersection of School street therewith.

Sometime prior to 1903 the city built a catch-basin at the northeast corner of State and School streets, but wholly within the street, leaving two blind pipes each about thirty inches in length, one extending north onto the east gutter line of State street and one extending east in the north gutter line of School street. A pipe from this catch-basin was laid across the street and connected with the sewer on the west side of State street.

The plaintiff purchased the property at the northeast corner of the intersection of State and School streets in May, 1903, where he installed a newspaper plant, and soon thereafter caused a connection to be made between the basement of the building thereon and the catch-basin at said northeast corner, connecting with the thirty-inch pipe extending east in the north gutter line of School street. He obtained no formal permit from the city council to make this connection. He spoke to the mayor and members of the street committee individually before making the connection and they made no objection thereto. The connection was made at his own expense and the city had nothing to do with it. He paid the city nothing for this connection, and no taxes were ever laid upon his property at the northeast corner of State and School streets for the erection or maintenance of this or any other sewer.

On the 5th of October, 1915, the common council of *Chilton,* by resolution, adopted plans and specifications prepared by an engineer for a storm-water sewer on the north side of School street extending from the State-street sewer east on School street, a distance of 528 feet, connecting with the sur-

face-water sewer on State street. The engineer called attention to the fact that the present fifteen-inch pipe located on the westerly side of State street would be insufficient to carry the additional water that would be introduced therein by the new sewer and recommended that it be replaced by a twenty-four-inch pipe. The resolution of October 5th provided that "the present fifteen-inch pipe located on the westerly side of State street be replaced by a twenty-four-inch pipe as soon as possible after the completion of the proposed storm drain on School street." Shortly after the adoption of said resolution the plaintiff served written notice on the common council that the proposed sewer on School street and the connection thereof with the State-street sewer would discharge more water into the State-street sewer than could be carried off by the fifteen-inch pipe, would block up said fifteen-inch pipe, and set the water back into plaintiff's basement, to his great damage, etc., and that plaintiff would hold the city liable for all damage resulting therefrom. On or about June 1, 1916, during a heavy rain storm in said city, the water was blocked in said sewer and backed up through the said drain into plaintiff's basement, causing considerable damage to his basement and property located therein. This action was brought to recover such damages.

The case was tried before a jury, resulting in a special verdict entitling defendant to judgment. From an order setting aside said special verdict and granting a new trial the defendant appealed.

T. L. Doyle of Fond du Lac, for the appellant.

J. E. McMullen of Chilton, for the respondent.

OWEN, J. A number of questions are presented and argued to which attention is unnecessary, for the reason that plaintiff's contributory negligence bars his right to recover in any view of the case. It appears from his written notice served upon the city that he understood perfectly that the

connection of the proposed School-street sewer with the State-street sewer was likely to introduce more water into the State-street sewer than could be carried away, and that, as a result, water was likely to back up and flood his basement in times of storm. Not only this, but it appears from the evidence that, upon several occasions before the School-street sewer was constructed, water had backed up into his basement, bringing with it surface *débris* from the streets, indicating that even before the construction of the School-street sewer the State-street sewer was inadequate. It seems not to have occurred to the plaintiff that he should have done anything to protect his own premises either before or after the construction of the School-street sewer. It appears from the evidence that there is a well known contrivance or device in the nature of a trap which he might have installed in his own drain that would have prevented the backing up of the water into his basement. He says that he did not know there was such a contrivance, but that there is, is almost common knowledge, and casual inquiry of any plumber would have supplied him with the information. The plaintiff could not lay upon the city the entire burden of saving his property harmless, thereby halting further improvements of community benefit, when he himself could so easily have prevented the damage. The situation called upon him to do what he could to protect his property. He did nothing. He must be held guilty of contributory negligence as a matter of law.

By the Court.—The order granting a new trial is reversed, and the cause remanded with directions to enter judgment for the defendant on the verdict.

LUMBERMEN'S NATIONAL BANK OF MENOMINEE, MICHIGAN, Respondent, vs. CORRIGAN and others, Respondents, and others, Appellants.

February 6—March 5, 1918.

Action: Connected conflicting claims: Settlement in one suit: Impleading new parties: Demurrer to cross-complaint: Mortgages: Foreclosure: Insurable interest of mortgagor after sale of premises: Loss payable to mortgagee: Mistake in policy: Reformation: Informality in judgment: Assignment of moneys payable under policy: Costs: Discretion.

1. After land was sold to one who assumed a mortgage thereon both the mortgagor and the purchaser procured insurance upon the buildings, one of which was afterwards damaged by fire. Action to foreclose the mortgage having been brought, the mortgagor claimed that by reason of certain facts the insurance companies were legally liable to pay the insurance moneys directly to the mortgagee and thus *pro tanto* discharge the mortgage before recourse was had to the property itself. The companies, though not contesting the validity of the policies, denied that they were liable to the mortgagee. *Held*, that such conflicting claims were so closely connected with the subject of the foreclosure action that they should be litigated and determined therein; and the companies were properly impleaded.
2. Where a new defendant is brought in under sec. 2656*a*, Stats., to answer a cross-complaint, a demurrer by him should, in ordinary cases at least, be directed to the cross-complaint, not to the original complaint, although he may answer the latter if he chooses.
3. A mortgagor who has sold the premises but remains liable for the mortgage debt has an insurable interest and, to protect himself, may take out a valid insurance policy in the name of the owner, with loss, if any, payable to the mortgagee, where all the facts are known to the insurer; and the mortgagee may enforce such policy in case of a loss.
4. Where the trial court found that both parties to an insurance policy intended that the loss should be payable to a mortgagee, but that by a mutual mistake the policy did not express such intent, a judgment based on the theory of a reformation of the policy should not be disturbed merely because such reformation was not formally adjudged.
5. Where the purchaser of mortgaged premises, who had assumed

the mortgage, procured insurance in his own name and, after a loss, assigned all moneys to become due on the policy to the mortgagor to be applied on the mortgage, providing, however, that any excess should be paid to said purchaser, and there was no excess, such assignment, whether it was in trust or otherwise, and the rights of all parties under the policy could properly be enforced in an action to foreclose the mortgage, in which all parties interested were before the court.

6. Where, in a foreclosure action, the mortgagor impleaded certain insurance companies and obtained judgment requiring them to pay the amount of a loss into court to be applied upon the mortgage, the awarding of costs to the mortgagor against said companies was not an abuse of discretion.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Mortgage foreclosure. The original complaint was in the usual form and the action was originally brought against the mortgagor and his grantee alone. By order of the court the insurance companies who are appellants were made defendants. There is no bill of exceptions. The facts are that the plaintiff owns a note of $2,400 given by the defendant *John E. Corrigan* March 16, 1911, to one Harmon, secured by mortgage (being the mortgage now under foreclosure) upon certain lots in Neenah. On the same day that the mortgage was given *Corrigan* sold the mortgaged premises to the defendant *Selin,* who assumed and agreed to pay the note and mortgage, and thereafter made three semi-annual payments of interest thereon. July 27, 1912, the defendant *Corrigan* procured at his own expense a policy of insurance for $2,400 from the *North River Insurance Company* covering the buildings on the mortgaged premises in the name of *Selin,* the owner, with the following rider attached: "It is understood that the above property is covered by a real-estate mortgage in favor of Mr. Harmon of Menominee." The insurance company knew the condition of the title and that *Corrigan* was not the owner but had an insurable interest therein as surety for the payment of the note, and it was the intention and real agreement of

both parties to make the loss payable to the mortgagee, the language of the aforesaid rider being used with the mistaken idea that it accomplished that purpose. The policy contained a clause permitting other insurance. Five days later *Selin* procured a policy of insurance in the *North British Company* on the residence situated on the premises in the sum of $3,000, said policy also permitting other insurance. On December 3, 1912, said residence was damaged by fire to the extent of $2,500 and proofs of loss were made on both policies in due time. December 28, 1912, *Selin* assigned in writing all moneys to become due under the *North British* policy, not exceeding $2,400, to *Corrigan,* the same to be applied on the mortgage, and the excess if any to be paid to *Selin.* This action was commenced March 23, 1914. Thereafter the defendant *Corrigan,* upon his sworn answer stating the facts, moved that the appellant insurance companies be made parties, and the court ordered that they be brought in as defendants, that the plaintiff serve an amended complaint upon them, and that the defendant *Corrigan* serve his answer and cross-complaint upon all the other parties to the action. The plaintiff amended its complaint by inserting an allegation that the defendant insurance companies were foreign fire insurance companies authorized to do business in Wisconsin and were made parties to the action pursuant to the order of court aforesaid. Thereupon *Corrigan* filed his cross-complaint alleging the aforesaid facts as to the issuance of the insurance policies, the fire, and the making of proofs thereof, and prayed that the insurance companies be required to pay into court the amounts due from them on their policies, and for such other relief as was equitable. The insurance companies filed general demurrers to the plaintiff's complaint and to *Corrigan's* cross-complaint, which were overruled. The appellant companies took no further steps in the case and the action was tried by the court, which found the facts substantially as hereinbefore stated, and

adjudged that the insurance companies pay into court their proportionate shares of the loss, amounting in the aggregate to $2,500, that the same be applied upon the note and mortgage, and that the plaintiff have the usual judgment of foreclosure and sale for the balance; also that *Corrigan* recover his costs against the insurance companies. From judgment entered in accordance with the findings the insurance companies appeal.

For the appellants there was a brief by *Gill & Barry* of Milwaukee, and oral argument by *Thomas H. Gill.*

For the respondent *Lumbermen's National Bank* there was a brief by *Sheridan, Evans & Merrill* of Green Bay, and oral argument by *W. L. Evans.*

For the respondent *Corrigan* there was a brief by *Paul D. Carpenter,* attorney, and *Charles W. Stark, Jr.,* of counsel, both of Milwaukee, and oral argument by *Mr. Carpenter.*

WINSLOW, C. J. It is not deemed necessary to take up the contentions urged by the appellants in detail; they will be sufficiently answered by the statement of some general propositions.

We regard this as a typical case where justice demands the settling in one action of a number of conflicting claims, all very closely connected. The situation was this: The original mortgagor (*Corrigan*) had deeded the mortgaged premises to *Selin,* who had agreed to pay the mortgage; thus, as between *Corrigan* and *Selin, Selin* became the principal debtor and *Corrigan* a surety. Both *Corrigan* and *Selin* insured the building on the premises, and the building thereafter burned. *Selin* having defaulted, foreclosure is begun. *Corrigan* comes in and claims that by reason of certain facts the insurance companies are legally liable to pay their respective losses directly to the mortgagee, and thus *pro tanto* discharge the mortgage before recourse is had to the property itself. The insurance companies contest this claim and in-

sist that they are not liable to the mortgagee, though not contesting the validity of the policies. It is manifest that these claims are all closely connected with the subject of the foreclosure action, and that subject is (under the rule laid down in *McArthur v. Moffet,* 143 Wis. 564, 128 N. W. 445) the primary right of the mortgagee to enforce his lien upon the mortgaged property together with the property itself. That these parties should be compelled to settle their rights and liabilities in several separate actions, thus duplicating expense and dragging out the controversy through a series of years, is not and never has been the idea of our code of procedure but rather the contrary. As said in *Hemenway v. Beecher,* 139 Wis. 399, 121 N. W. 150, speaking of secs. 2610 and 2656*a,* Stats., "The idea in both sections is to enable the court to grasp all the issues germane to the main controversy, whether arising between the plaintiff and the defendant, or between defendants, or between a defendant and an outside party, and dispose of them in one and the same action, and thus avoid circuity of action and multiplicity of suits." It has been and still is the aim of this court to carry out this beneficent idea and thus realize as fully as possible the constitutional guaranty of justice administered "promptly and without delay."

This brings us to a consideration of the merits. When a third party is brought in and made a defendant under the provisions of sec. 2656*a* to answer to a cross-complaint, his concern is with the cross-complaint rather than with the original complaint. No reason is perceived why it was necessary in the present case that the original complaint should have been amended at all. In many cases the plaintiff may know nothing of the facts which the defendant who makes the cross-complaint relies on, and in fact the plaintiff's interest may be rather with the interpleaded person than with cross-complainant. It is evident that, in all ordinary cases at least, the pleading to which the new party should answer or

demur is the cross-complaint. Doubtless he may answer the original complaint if he chooses, but any demurrer on his part to the original complaint is out of place; it should be directed to the cross-complaint, for that is the pleading which asks relief as against him. We think the cross-complaint in the present case stated a good cause of action against the insurance companies, and, the findings of the court being in accordance with its allegations, it follows that the judgment must be affirmed.

It is clear that *Corrigan* had an insurable interest resulting from the fact that he was liable for the payment of the mortgage debt. *Williams v. Roger Williams Ins. Co.* 107 Mass. 377. Having such insurable interest, we know of no reason either in law or morals why he could not take out a valid insurance policy on the premises in the name of the owner, with a provision that the loss, if any, should be payable to the mortgagee, the facts all being known to the insurance company. True, the policy taken out by *Corrigan* was not on its face payable to the mortgagee, but the court found that such was the intention of the parties and that the rider was placed in the policy under the mistaken idea on both sides that it expressed that intent; and, while the judgment did not in terms reform the policy, all the facts were found which justified and called for reformation, and the judgment can only be sustained on the theory of reformation. Under such circumstances it must be considered that the omission to enter a formal judgment of reformation should not be allowed to prejudice the result here. The sum and substance of the matter is, in relation to the *North River* policy taken out by *Corrigan,* that a man having an insurable interest in mortgaged property took out and paid for a policy of insurance thereon and presented it to the mortgagee, and the mortgagee accepted it and is enforcing it. The insurance company thereby made a valid contract with *Corrigan* not merely for *Corrigan's* benefit, but for the bene-

fit of the mortgagee, and we know of no reason why the mortgagee should not enforce it as is being done here. *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440.

As to the *North British* policy taken out and paid for by the owner, *Selin,* in his own name, all moneys to become due thereon (not exceeding $2,400) were assigned by *Selin* to *Corrigan* after the fire to be applied on the mortgage, the excess if any to be paid to *Selin.* There was no excess, as we have seen. Why the amount due on this policy should not be applied as directed by the assignment to *Corrigan* does not appear. It is said that the assignment to *Corrigan* is only an assignment in trust and gives him no right of action, but makes him merely an appointee, and that the property in the policy still remains in *Selin.*

If this be admitted, still we think the judgment right; both *Corrigan* and *Selin* are parties to this action and between them they represent the full ownership of the policy. *Selin* makes no claim to control the policy, but is content to stand by his assignment: he is bound by the results of the action. We see no reason why the court should not deal with and enforce the policy as the rights of the parties appear to be, all the parties interested being before the court. There was no abuse of discretion in awarding costs in favor of *Corrigan* against the appellants.

By the Court.—Judgment affirmed.

ESTATE OF CARTER: STATE, Appellant, vs. CARTER, Administrator, Respondent.

February 7—March 5, 1918.

Appeal: Affirmance: Equal division in appellate court: Inheritance tax: "Property or estate partly within and partly without this state."

A judgment of a circuit court affirming a judgment of a county court—to the effect that sub. 5, sec. 1087—11, Stats., did not apply to the estate of a resident of another state who died leaving an estate located partly in that state and partly in Wisconsin, and that the inheritance tax to be paid by those entitled to receive the estate in Wisconsin should be determined precisely as if the decedent's estate consisted only of the property located here—is affirmed, this court being equally divided on the question.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The appeal is by the *State of Wisconsin* from a judgment of the circuit court in all things confirming a judgment of the county court determining the inheritance taxes due on the transfer of the estate of Benjamin F. Carter, deceased, late of Los Angeles, California.

The case involves the interpretation of sub. 5, sec. 1087—11, Stats., wherein provision is made for the apportionment of debts, expenses, and exemptions in "an estate which is partly within and partly without this state."

The county and circuit courts held that this section of the statute did not apply to Mr. Carter's estate, which was located partly in Wisconsin and partly in the state of California, where he resided at the time of his decease. In ascertaining the amount of the inheritance tax to be paid by those entitled to receive the estate in Wisconsin the lower courts determined the tax precisely as they would have done had Mr. Carter's estate consisted only of the real and personal property located in Wisconsin. The *State* asked that this tax be

determined according to the rule prescribed by sub. 5, sec. 1087—11, Stats., in cases of transfers of any property or estate partly within and partly without this state.

For the appellant there was a brief by the *Attorney General* and *E. E. Brossard,* assistant attorney general, and oral argument by *Mr. Brossard.*

For the respondent there was a brief by *Williams & Williams* of Oshkosh, and oral argument by *George E. Williams.*

SIEBECKER, J. Mr. Justice OWEN, by reason of having had charge of this case as attorney general of the state before becoming a member of this court, did not participate in the hearing and decision of this case. The court, after careful consideration of the question involved, is equally divided. Justices VINJE, ROSENBERRY, and ESCHWEILER are of the opinion that the judgment of the lower courts should be affirmed, and Chief Justice WINSLOW, Justice KERWIN, and the writer are of the opinion that the judgment should be reversed. This situation, under the established rule, necessitates affirmance of the judgment appealed from. *Hagenah v. Milwaukee E. R. & L. Co.* 136 Wis. 300, 116 N. W. 843.

By the Court.—The judgment of the circuit court is affirmed. No costs to be taxed in favor of either party. The appellant to pay the clerk's fees.

STATE EX REL. MANITOWOC LAND & FUEL COMPANY, Respondent, vs. KELLEY, City Clerk, and others, Appellants.

February 7—March 5, 1918.

Municipal corporations: Vacation of streets: Proceedings: Vote required: Special charters and general laws.

1. In a city of the second or third class having a special charter, if the provisions in such charter relating to the vacation of streets and alleys are not made exclusive, the common council may, under the authority of sub. 1, sec. 927, Stats., proceed to vacate a street in the manner prescribed in sec. 904, and in such case the resolution of discontinuance may be adopted by a majority vote of the aldermen, even though in such a proceeding taken under the special charter a two-thirds vote is required.
2. Where the method provided by the general statutes for vacating a street is adopted, that method must be followed throughout the whole proceeding.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was commenced by a petition for a peremptory writ of *mandamus* to compel the city authorities of the city of *Manitowoc* to enter upon the record of the minutes of the board of aldermen a resolution providing for vacation of a street. The petition set forth, among other things, that on the 16th day of June, 1917, the petitioner filed in writing in the office of the city clerk of the city of *Manitowoc* a petition directed to the mayor and board of aldermen praying that that part of South Seventh street in said city from the north line of Quay street to the Manitowoc river be discontinued and vacated; that said petition was signed by more than twenty resident freeholders of the First ward in said city, said part of said street, asked to be vacated, being located in the First ward; that said petition was signed by the owners of all the frontage of the lots and lands abutting upon the portion of said street sought to be discontinued and

vacated and by the owners of more than one half of the frontage of the lots and lands abutting on all that portion of the remainder of said street which lies 2,650 feet from the ends of the portion proposed to be discontinued; that said petition was presented to the board of aldermen of said city at a regular meeting and referred to a committee of said board; that said committee duly considered said matter and ordered hearing thereon and notice to be duly given; that due proceedings were had thereon and notice given and the matter afterwards considered at a regular meeting of the board of aldermen on the 6th day of August, 1917, and consideration thereof continued to the 4th day of September, 1917, and a resolution for vacating and discontinuing in accordance with the petition was duly considered by the board of aldermen of said city of *Manitowoc,* all the aldermen and the mayor being present; that a vote upon said resolution was duly taken and recorded; that eight of the aldermen voted in favor of the adoption of said resolution and six voted against it; that thereupon the mayor announced that said resolution was lost or defeated; and that the petitioner demanded that the mayor declare said resolution adopted and the city clerk make an entry in the minutes to that effect, but the mayor and city clerk each refused so to do. The mayor refused to declare the resolution adopted on the ground that it required a two-thirds vote of the members of the board of aldermen elect to vacate a street.

An alternative writ of *mandamus* was issued and return thereto duly made. The return set forth that the reason why the board of aldermen could not comply with the requirements of said writ was because said resolution vacating and discontinuing said street was not legally adopted. The petitioner, respondent here, demurred to said return, which demurrer was sustained, and from the order sustaining it this appeal was taken.

For the appellants there was a brief by *L. W. Ledvina,* city attorney, and *E. L. Kelley* of Manitowoc, of counsel, and oral argument by *Mr. Ledvina.*

For the respondent there was a brief by *Hougen & Brady* of Manitowoc, and oral argument by *A. L. Hougen.*

KERWIN, J. The return to the writ which was demurred to raises the question whether the adoption of the resolution required a two-thirds vote of the aldermen.

On the part of the appellants it is insisted that the resolution was not adopted because two thirds of the aldermen did not vote for it and that the charter of the city of *Manitowoc* requires a vote of two thirds of all the aldermen to vacate a street, and that the doctrine of *Johnston v. Lonstorf,* 128 Wis. 17, 107 N. W. 459, does not rule the instant case.

On the part of the respondent it is contended (1) that *Johnston v. Lonstorf, supra,* rules this case and hence the charter provisions which do not provide for the assessment of damages are void, and (2) that proceedings to vacate the street in question might be taken under the general statutes, secs. 904 and 927 and other provisions of the statutes, as well as under the city charter of the city of *Manitowoc,* even if the charter provisions were valid.

If the second contention of counsel is well made we need not consider the application of the rule laid down in *Johnston v. Lonstorf* to the instant case.

A review of the changes made in the general statutes, particularly in secs. 904 and 927, respecting the vacation of streets and alleys, we think will shed some light upon the question under consideration.

Sec. 904, Stats., as originally passed is sec. 64, ch. 188, Laws 1872, and provides that "Upon the petition in writing of all the owners of lots or land on any street or alley in such village, and not otherwise, the board of trustees may

discontinue such street or alley;" also provides for one week's notice before acting upon such petition.

Ch. 174, Laws 1891, amends the foregoing law so as to include the owners of all lots or land on the portion of the street to be vacated and "two thirds of the owners of lots or land on the remainder of such street or alley, . . . and not otherwise." The law as thus amended was carried into the Statutes of 1898 as sec. 904. Sec. 904 was repealed and re-enacted by ch. 517, Laws 1911, and as so re-enacted is now, and has been since 1911, sec. 904, Stats., and provides for the discontinuance upon the written petition of the owners of all frontage of the lots and lands abutting upon the portion sought to be discontinued and of the owners of more than one half of the frontage of lots and lands abutting on the portion of the remainder which lies within 2,650 feet from the ends of the portion proposed to be discontinued. It will be observed that by this amendment the words found in this section as it formerly existed, "and not otherwise," are omitted, and further provision is made for three weeks' notice where one was provided under the former statute.

Sec. 927, Stats., as it appeared in the Statutes of 1898, provided among other things that the board of trustees of every village incorporated under special law and the common council of every city might exercise all the powers conferred on village boards by secs. 895 to 904, inclusive, and proceed in the manner therein prescribed.

This section was amended by ch. 169, Laws 1903, by adding after the word "inclusive," in the seventh line of said section, the following: "and by sections 919*a* to 919*m*, inclusive."

The section was further amended by ch. 394, Laws 1905, by adding "whether acting under the general law or under a special charter," and by ch. 517, Laws 1911, sec. 927 was repealed and re-enacted and the above-quoted words added

by ch. 394, Laws 1905, were dropped and in lieu thereof the following words inserted: "as well as the powers and privileges conferred by the provisions of their respective charters."

Sec. 927 remained the same since its re-enactment in 1911 to the present time and was in force at the time the present proceedings were commenced.

Sub. 2, sec. 927, Stats., makes a different rule in regard to cities of the first and fourth class; it provides that every city of the first and fourth class shall possess and exercise the powers, privileges, and procedure granted to cities of the second and third class, except that no action shall be had by any city of the first or fourth class and villages under sec. 904 unless the petition be signed by all the owners of lots and land abutting on the portion of the road or alley proposed to be discontinued and two thirds of the owners of lots and lands abutting on the remainder thereof, "and not otherwise," while sub. 1, sec. 927, relating to cities of the second and third class, as will be seen, has somewhat different provisions and does not contain the phrase "and not otherwise." The city of *Manitowoc* does not belong to the first or fourth class, hence does not come within the restriction mentioned in sub. 2. The history of legislation on the subject shows quite clearly that it was the intention of the legislature to provide by general law a method for the vacation of streets and alleys in cities of the second and third class independent of the charter provisions, where the provisions of the city charter are not made exclusive.

Counsel for appellants rely on *Baines v. Janesville,* 100 Wis. 369, 75 N. W. 404. It will be seen that in that case the charter provisions on the subject preclude any other method of vacating streets and alleys. It provided that streets should be vacated in the way specified in the charter "and not otherwise." It was held in *Baines v. Janesville*

that the city of Janesville was taken completely out from under the general statutes so far as discontinuing or vacating any street or alley or any part thereof was concerned.

The charter of the city of *Manitowoc,* however, is not subject to such construction. There is nothing in it indicating a legislative intention to make the provisions for vacating streets and alleys exclusive.

Sec. 110 of the charter of the city of *Manitowoc* provides:

"The board of aldermen shall have the power to vacate any street or alley or any block or part of a block in said city upon a written petition signed by twenty or more resident freeholders of the ward in which such street, alley, or block is situated, provided, that two thirds of the aldermen elect shall be required to vote in favor of any such application before it shall be granted."

The method for vacating streets and alleys provided by this section is not exclusive.

The general statutes in force at the time this proceeding was commenced and still in force provide a method for vacating streets and alleys which is made to apply to all cities of the second and third class.

Sec. 904, Stats., provides:

"The whole or any part of any road, street, slip, pier, lane or alley, in any lawfully incorporated village, may be discontinued by the board of trustees of such village, upon the written petition of the owners of all the frontage of the lots and lands abutting upon the portion thereof sought to be discontinued, and of the owners of more than one half of the frontage of the lots and lands abutting on that portion of the remainder thereof, which lies within two thousand six hundred and fifty feet from the ends of the portion proposed to be discontinued."

Sec. 927, Stats., provides:

"1. Every village incorporated under special law shall have and possess, and may exercise and pursue all the rights, powers, privileges and procedure conferred, granted or prescribed by sections 870 and 893 of the statutes. The board

of trustees of every such village, and the common council of every city of the second and third classes, shall at all times have and possess, and may exercise and pursue all the rights, powers, privileges and procedure conferred, granted or prescribed by sections 895 to 904, inclusive, as well as the powers and privileges conferred by the provisions of their respective charters, and may levy and collect the expense incurred in exercising such rights, powers and privileges, including all damages and costs incurred by the taking of private property, in the manner provided by section 903 or, at their option, in the manner provided by sections 925—190 to 925—197*a* of the statutes."

It seems plain that the legislative idea was that cities of the second and third class might proceed under the general statutes or under the charter method. The power is given to pursue the procedure prescribed by statute, "as well as the powers and privileges conferred by the provisions of their respective charters." In the instant case the proceeding was taken under the method provided by the general statutes, notices given, hearing had, and vote taken. Obviously the mayor concluded, after the vote had been taken, that the result should be determined not by the statute under which the proceeding was carried on up to that point, but by charter provisions. This conclusion resulted in pursuing one method until after the vote had been taken and then switching to the other method. This the board had no right to do. When the method under the general statutes was adopted that method should have been pursued throughout the whole proceeding. The board had no power to proceed in part under the statutes and in part under the charter. The statutes on the subject do not provide what vote of the aldermen is required, hence a majority vote was sufficient to adopt the resolution.

Following the provisions of the general statutes the resolution was duly adopted and the petitioner was entitled to have the result so declared and recorded.

By the Court.—The order appealed from is affirmed.

WADE, Appellant, vs. SHEBOYGAN COUNTY, Respondent.

February 7—March 5, 1918.

Officers: Ratification of acts of agent: Superintending construction of bridges: Compensation: Claim against county.

1. Public officers may ratify those acts of an agent which they had authority to direct him to do when done and which they could authorize at the time of ratification.
2. Thus where a town chairman was, by virtue of sub. 8 (4), sec. 1317*m*—5, Stats. 1915, *ex officio* a member of the county state road and bridge committee, and as such member, but without any specific direction of the committee, superintended the construction of certain bridges in the town, and where such committee, which might in the first instance have authorized him to do such work, with full knowledge of the facts approved his bill for the compensation specified in sub. 8 (1), sec. 1317*m*—5, Stats. 1915, and recommended its allowance by the county board, there was a complete ratification of his acts, and his claim, being legal and just, could not lawfully be disallowed.

APPEAL from a judgment of the circuit court for Sheboygan county: W. B. QUINLAN, Judge. *Reversed.*

Plaintiff was chairman of the town of Greenbush, which had voted to pay a portion of the cost of the construction of four bridges within its limits. By virtue of sub. 8 (4), sec. 1317*m*—5, Stats. 1915, that made him *ex officio* a member of the county state road and bridge committee. As such member, but without any specific direction of the committee, he superintended the construction of the four bridges. Sub. 8 (1), sec. 1317*m*—5, provides for the compensation of such services by the county board. His per diem and expenses amounted to $23.90, and for that amount he rendered a bill which was unanimously approved by the county state road and bridge committee before it was presented to the county board for allowance. The county board first allowed the claim, then five days later rescinded its action, and the next day disallowed it. Plaintiff appealed to the circuit court

for Sheboygan county, and from a judgment of that court affirming the action of the county board he appealed to this court.

The cause was submitted for the appellant on the brief of *M. C. Mead* of Plymouth, and for the respondent on that of *Charles Voigt* of Sheboygan.

VINJE, J. No claim is made that the per diem and items of expense were not in accordance with the facts or the statute, if plaintiff was entitled to recover at all. It does not appear why the county board finally disallowed the claim. The circuit court disallowed it on the ground that plaintiff was not authorized by the county state road and bridge committee to superintend or inspect the work before he did so, and this is the fact. But he presented to the committee his itemized bill for his per diem and expenses for such work, and the bill was examined by the committee and unanimously recommended for allowance. The committee could have authorized the inspection in the first instance; failing in that, it could disavow, ignore, or ratify the acts of plaintiff when they came to its knowledge. They chose to ratify them. Clearer evidence of ratification than here exists can scarcely be found. It is made a matter of record by the proceedings of the county board. And when the committee, with full knowledge of all the facts, approved of the bill, the acts of plaintiff in superintending the construction of the bridges became as lawful as if he had been directed by it in the first instance to do so; and the county board could not lawfully disallow the claim because it was a just one and legally incurred. Under familiar principles public officers may ratify those acts of an agent which they had authority to direct him to do when done and which they could authorize at the time of ratification. Mechem, Pub. Off. § 534; *Koch v. Milwaukee,* 89 Wis. 220, 62 N. W. 918; *Frederick v. Douglas Co.* 96 Wis. 411, 424, 71 N. W. 798. The facts of this case

bring it squarely within those principles and the claim should have been allowed.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiff for $23.90, with interest and costs.

WILL OF BOCKER: CLARK and others, Appellants, vs. MUELLER, Respondent.

February 7—March 5, 1918.

Wills: Validity: Undue influence.

1. Where the chief beneficiary under a will had opportunity and the disposition to influence the testatrix, and the coveted result expressed in the will was attained by coercion, not by importunity merely, the will must be set aside.
2. The evidence in this case is *held* to show, contrary to findings by the county and circuit courts, that undue influence was exercised upon a testatrix by an adopted daughter to whom practically the whole estate was given.

APPEAL from a judgment of the circuit court for Sheboygan county: CHESTER A. FOWLER, Judge. *Reversed.*

The appeal is from a judgment admitting the will of Johanna Bocker, deceased, to probate.

March 29, 1916, Johanna Bocker, a widow for over thirty years and more than that length of time a resident of the city of Sheboygan, died. She left property valued at between $25,000 and $30,000 in mortgages, which she had accumulated by her work as a midwife and by a life of the most rigid economy. She left as her only surviving heirs one grandchild, *Mrs. Theresa Clark,* four great-grandchildren, children of two predeceased granddaughters, and an adopted daughter, *Selma Mueller,* who is the proponent herein. The will, which was executed January 20, 1916, and admitted to probate in the county and circuit courts below, after the usual clause directing the payment of debts

and funeral expenses gave to the grandchild and the great-grandchildren each $5 in cash. By the third paragraph all the rest, residue, and remainder of the estate, both real and personal, was given to her adopted daughter, *Selma,* and recited further:

"It is the declared purpose by this my will, to restrict and limit my said grandchild and my said great-grandchildren's interest in my estate under this my will, in any event to the bequest of five dollars given each and no more."

Selma was appointed executrix of the will, and request was made that she be allowed to settle the affairs of the estate without giving a bond.

Selma, who was a child of a sister of the deceased, came to Sheboygan, Wisconsin, from her birth place in Germany at the request of the deceased about thirty-one years preceding 1916, then a child of about thirteen years of age, and lived with the deceased from that time continuously until the death. *Selma* was required by the testatrix to perform a great deal of drudgery and hard work and at times had gone to work in a factory and at other places and turned her earnings in to the deceased. In 1908 *Selma* was formally adopted by Mrs. Bocker, and in 1913 married one Philip Mueller. Shortly after the marriage the homestead, worth between $3,000 and $4,000, was conveyed by Mrs. Bocker to *Selma,* who, with her husband, continued to reside there with Mrs. Bocker. Neither Mrs. Bocker nor *Selma* had educational advantages to speak of and could barely read or write. Mrs. Bocker was a woman of vigorous and dominant personality and extremely secretive about her business affairs; apparently no one other than a Mr. Clarenbach, who looked after her investments, knew, prior to her death, the amount of her property.

Three of the great-grandchildren lived in Sheboygan, and the grandchild visited there occasionally, and these four were visitors at the home of Mrs. Bocker from time to time, but

there was evidently no great amount of affection between them, and the situation in that regard appears to have undergone no change for many years preceding the death of Mrs. Bocker. The adopted daughter, *Selma,* was, as it would appear from the record herein, somewhat below the average in mentality, and until the last few years at least quite absolutely under the control and direction of Mrs. Bocker.

Several wills had been executed by the testatrix prior to the one of January 20, 1916. The last preceding will was drawn by an attorney in Sheboygan and executed by Mrs. Bocker sometime in the fore part of December, 1915. About December 28th Mrs. Bocker had a Dr. Tasche, a long-time friend and one who occasionally attended her as a physician, come to her house and had him read and translate to her the will that had been executed a few days before. This was done in the presence and hearing of *Selma,* and after it had been read and translated it was torn up by Mrs. Bocker and at her direction burned.

The will of January 20, 1916, was drawn by a neighbor engaged in the real-estate business who had never done any business for Mrs. Bocker before.

Both the county and circuit courts found that there was no undue influence exercised upon the testatrix by *Selma Mueller* and that the will should be admitted to probate, and from such determination by the circuit court the contestants appeal.

For the appellants there was a brief by *Edward Voigt* and *Bowler & Bowler* of Sheboygan, and oral argument by *T. M. Bowler.*

Otto J. Trilling and *F. H. Denison* of Sheboygan, for the respondent.

ESCHWEILER, J. The court below, in his written decision upon which the findings were based, stated as follows:

"That some of the facts essential to void a will for undue influence existed is very plain. The adopted daughter had

ample opportunity to exert influence over the deceased, and she had the disposition to use such influence. She also importuned the testatrix to make a will, and the will made was such as the adopted daughter wanted. But does it appear that the deceased was 'unquestionably subject to undue influence,' and how much evidence is there of overt acts of the adopted daughter after the former will was revoked? The deceased was obviously a strong-minded and strong-willed woman and she retained her faculties unimpaired to the last, except as to hearing, and there was no change in that respect for a long period prior to her death. That the adopted daughter importuned her not only to destroy the former but to execute the last will I have no doubt. But that she coerced the will of the old lady, that is, overpowered her will and rendered her incapable of exercising her free will power, I do not feel convinced."

From such decision it appears that there was but one element lacking in order to meet the essential requirements to warrant setting aside a will because of undue influence. *Skrinsrud v. Schwenn,* 158 Wis. 142, 147 N. W. 370. Opportunity to influence, disposition to influence, and the coveted result are all present and so found. If the court erred in holding that there was not sufficient in the record to warrant a conclusion, based upon clear and satisfactory evidence, that the result expressed in the will was attained by the coercion, not importunity merely, of *Selma,* then the will must be set aside. *Elliott v. Fisk,* 162 Wis. 249, 155 N. W. 110.

Although giving full force to the rule that must and does govern us in disposing of questions of fact, namely, that the findings of the trial court, with the advantages he has in hearing and seeing the witnesses, stand on a more than substantial footing, yet the facts and circumstances in this case convince us that the court below in his findings stopped just short of reaching the right result. We base this conclusion upon the following facts and situations:

In 1908, when *Selma,* then a woman of about thirty-six

years of age, was adopted, Mrs. Bocker expressed herself as desirous of taking such step in order that she might properly or safely will her property to *Selma;* yet notwithstanding such expression of intention, in the will executed by her in December, 1915, she provided that there should be paid to her grandchild, *Mrs. Clark,* the sum of $2,000, to the four great-grandchildren $500 each, to two nieces in Germany, sisters of *Selma,* $500 each; $100 to the widow of a deceased grandchild, and $500 to a church in Sheboygan; the remainder going to *Selma.* This would have given at least $20,000 to *Selma* over and above the homestead theretofore conveyed. There is no question, and it is conceded by all, that at the time of the executing of the will Mrs. Bocker was competent to make such an instrument and fully realized what she had, to whom and how it was given. It was a natural and proper disposition of her property among those who were related to her by the ties of blood, and it also recognized very substantially the long years of service that *Selma* had rendered to her adopted mother.

Considerable protest was made by *Selma* to the provisions of this will at the time the same was being executed so far as it provided for any one than herself, even begrudging to her sisters the small amount that was left to them, for she, not knowing the amount of property that would be left after the specific bequests of $6,500 had been paid, seemed to fear that there was probably little, if anything, left for her.

When the friend and physician, Dr. Tasche, was called December 28, 1915, and requested by Mrs. Bocker to read the will so shortly before executed by her, *Selma* persisted in remaining within hearing and expressed herself in vigorous language about the contents of the will and about the other beneficiaries therein; that the relatives other than herself were not entitled to share in the property in view of the fact, as she expressed it, they had not helped in the work. Mrs. Bocker without much, if any, expression of dissatisfaction

herself as to the terms of the will, tore it up and directed that it be burned, as it was.

At this interview, according to the testimony of Dr. Tasche, and there is little, if anything, to cast any discredit upon his testimony, Mrs. Bocker remarked that *Selma* was everlastingly after her to have the will changed and that she, Mrs. Bocker, felt that if it wasn't changed she wouldn't be at peace.

At this time Mrs. Bocker was quite feeble, could no longer go out, and required the help of crutches or of some person in order to move about the house. There was talk at this time of it being necessary to have her taken care of in the hospital. To this proposal Mrs. Bocker was very much opposed. There was testimony of a neighbor, Mrs. Braun, to the effect that *Selma* stated to her that unless Mrs. Bocker changed her will that she, *Selma,* would leave her. Such action by *Selma* would undoubtedly have resulted in Mrs. Bocker's going to the hospital.

Some stress was evidently laid by the trial court upon the fact that there was no evidence of any overt acts tending to show the exercise of undue influence by *Selma* in the interval between the destruction of the one will and the execution of the one here. But it does appear that during this same interval there was no one else living in the house with this infirm old lady than *Selma* and her husband. Those two had full control of the situation. From *Selma's* own admissions it appears that the subject of this will was discussed between herself and Mrs. Bocker during this same interval.

Selma having been called as an adverse witness by the contestants was examined fully as to the situation between herself and Mrs. Bocker, and by such examination and consequent waiver of any objection to her testifying on her own behalf as to transactions with the deceased was afforded ample opportunity to explain the entire situation. There

is no satisfactory explanation by her as to this great change in the disposition of Mrs. Bocker's property as expressed by the two wills.

We feel that the logic of the situation made it incumbent upon a proponent of a will, situated towards the maker of it as *Selma* was towards Mrs. Bocker, to meet and overcome the natural and irresistible presumption that arose from this unexplained change in the two documents, when there was such clear proof of the disposition to exercise undue influence, such abundant opportunity to exercise it, and where a so ardently desired result is so plainly manifest. It cannot be ascribed to mere importunity when we consider that in spite of the years that elapsed between 1908, when Mrs. Bocker took definite steps to adopt *Selma* that she might be in a position to safely, in her judgment, reward her in her will, up until the time she made the will in December, the years of service rendered by her, and the obligation Mrs. Bocker evidently felt under towards her, had not been sufficient to cause Mrs. Bocker to overlook the considerations of the ties of blood that bound her to those whom she mentioned in that will.

To us, under the record in this case, there is no escape from the conclusion that the complete reversal by the will herein from the natural disposition of the will of December was arrived at by far more than mere importunity on the part of *Selma*. This old, dying woman of eighty-nine, fearing that she might have to pass her last days in the—to her—dreaded hospital instead of her own home, wishing the peace in those last days that could only be obtained by a yielding on her part, did at last bend her will to that of the, for once, superior force and power that circumstances had finally placed with *Selma*, and the latter's greed ought not to be rewarded.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter

judgment denying the probate of the document of January 20, 1916. Contestants to have their costs and disbursements in this court and in the court below.

SIEBECKER, J., dissents.

DE GROOT, Appellant, vs. VELDBOOM, Respondent.

February 7—March 5, 1918.

Replevin: Counterclaim for fraud: "Connected with the subject of the action:" Special verdict: Omissions: Presumed findings by court: Judgment: Granting relief to both parties: Evidence as to fraud: Sufficiency.

1. In replevin for personal property which plaintiff was to receive in exchange for land conveyed to defendant, although no contract or transaction was set forth in the complaint the defendant properly pleaded a counterclaim for fraud of the plaintiff by which defendant was induced, at the time of making the exchange, to accept a deed of the land by the terms of which he assumed a mortgage thereon instead of getting a clear title,—such cause of action being "connected with the subject of the action" within the meaning of sec. 2656, Stats.
2. A special verdict in such action containing a finding of the fraud but no finding as to whether or not defendant was negligent in accepting the deed, was defective, but under sec. 2858*m*, Stats., no request for a submission of the latter question having been made, the fact must be deemed to have been found by the court against the plaintiff in conformity with the judgment against him.
3. No reformation of the deed having been sought, the defendant, who recovers damages for the fraud, will be bound by the terms of the deed and must pay the mortgage debt.
4. In replevin for personal property which plaintiff was to receive in an exchange, where defendant counterclaimed for plaintiff's fraud in connection with the exchange, a judgment awarding the property to plaintiff and damages to defendant on his counterclaim was proper in form and did not constitute two judgments.
5. Recovery may be had in cases of fraud where the fraud is established by a clear and satisfactory preponderance of the evidence.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Replevin and counterclaim. The material facts are as follows: On May 12, 1914, the plaintiff was the owner of a small tract of land. At the same time the defendant was the owner of a threshing-machine outfit. On said day the plaintiff and the defendant agreed upon an exchange of their property, by which the plaintiff was to deed to the defendant the real estate, and the defendant was to convey to the plaintiff by bill of sale the threshing outfit and to pay in addition thereto the sum of $575. There was a mortgage upon the land for $800, which the defendant claims plaintiff was to pay, and which plaintiff claims the defendant was to pay. The following day the parties met in the city of Sheboygan and a deed was prepared, by the terms of which the defendant assumed and agreed to pay the mortgage. The defendant paid the plaintiff $575, the bill of sale was executed, and immediately thereafter a controversy arose in regard to the $800, the defendant claiming that he did not understand the language used to mean that he was to pay the mortgage. Plaintiff refused to rectify it. Thereafter the defendant had the deed recorded and took possession of the real estate, and on October 17, 1914, sold the same subject to the mortgage, the purchaser, however, assuming and agreeing to pay the mortgage. The threshing outfit remained in the possession of the defendant and delivery was refused. This action was begun originally against a brother of the defendant upon whose premises the machine was situated, and upon proceedings the defendant here was substituted for the original defendant and the action proceeded. The complaint is for replevin in the usual form. The defendant answered, denied ownership of the property in the plaintiff, made other allegations relating to defensive matters, and by way of counterclaim alleged that on May 13, 1914, the plaintiff was the owner of the real estate referred to; that defendant

did not know that there was a mortgage on said property, which fact was known to the plaintiff; that immediately upon discovery of the fact that he had assumed and agreed to pay the mortgage he offered to return the deed and demanded the bill of sale and the amount of cash he paid to the plaintiff and a rescission of the sale; that plaintiff knew at the time of the transaction that defendant understood that he was to receive a deed to the property free and clear of all incumbrances; that plaintiff wrongfully and fraudulently led the defendant to believe that the title he was getting to the property was free and clear of all incumbrances; further alleged that when plaintiff discovered that the defendant had learned of the existence of the mortgage lien and its effect upon his title to the land, plaintiff promised and agreed to save the defendant harmless from such mortgage lien, which the plaintiff has refused to do; that the matters set out in the counterclaim arose out of the same transaction as that described in plaintiff's complaint, and that the cause of action set forth in the defendant's counterclaim is connected with the subject of plaintiff's action, and demanded judgment against the plaintiff for the sum of $800 with interest at the rate of four per cent. per annum from April 1, 1914. There was a reply to the counterclaim, and upon the issue so made the cause was submitted to the jury. The jury found as follows:

"(1) At the time when the plaintiff, *Peter De Groot,* and his wife executed and delivered to the defendant, *John R. Veldboom,* the deed which conveys to him the land described in his answer, and when he executed and delivered to plaintiff the bill of sale of the personal property described therein and in the affidavit for replevin, and paid to plaintiff $575 in money as the purchase price of said land, did *John R. Veldboom* then understand and believe that the mortgage for $800 which was then a lien on said land should be paid by the plaintiff, *De Groot,* under the agreement as *Veldboom* understood it? *A.* Yes.

"(2) Did *John R. Veldboom* pay said money and execute

and deliver said bill of sale to plaintiff upon the belief and understanding on *Veldboom's* part that the plaintiff, *De Groot,* should pay said mortgage? *A.* Yes.

"(3) If your answer to the first question be 'Yes,' then answer this: Did the plaintiff by his own acts and conduct, or by the acts and words of his agent, Ira Jentink, lead *John R. Veldboom* to believe and understand that said mortgage was to be paid by *De Groot* under their agreement? *A.* As to *Peter De Groot* we answer Yes. As to Ira Jentink we answer Yes.

"(4) If your answer to the first question be 'Yes,' then answer this: At the time mentioned in the first question did plaintiff know that *John R. Veldboom* was buying the land and paying the consideration therefor upon the belief and understanding that the plaintiff, *De Groot,* should pay said mortgage? *A.* Yes.

"(5) If your answer to the fourth question be 'Yes,' then answer this: At any time before the deed was delivered and the consideration therefor was paid, did either the plaintiff, *De Groot,* or Charles Voigt, or Ira Jentink, inform *John R. Veldboom* in such a way as to be understood by him that *Veldboom* was to pay said mortgage? *A.* As to plaintiff, *De Groot,* we answer No. As to Ira Jentink we answer No. As to Charles Voigt we answer No.

"(6) On May 13, 1914, and after the bill of sale and the deed had been executed and delivered, did plaintiff promise and agree to and with *John R. Veldboom* to save him harmless from the lien of said mortgage? *A.* ——.

"(7) What was the market value of said land on May 13, 1914? *A.* $1,350.

"(8) On May 13, 1914, what was the market value of the personal property described in said bill of sale? *A.* $650."

Plaintiff made appropriate motions, and thereafter judgment was entered awarding the defendant $800, awarding the title and custody of the threshing outfit to the plaintiff, judgment therefor to be stayed, however, until the amount awarded the defendant was paid, and giving each party his costs and offsetting the same. From this judgment the plaintiff appeals.

For the appellant there was a brief by *Bowler & Bowler* of Sheboygan, and oral argument by *T. M. Bowler.*

For the respondent there was a brief by *Prescott & Gillen* of Sheboygan, and oral argument by *A. C. Prescott.*

ROSENBERRY, J. Plaintiff contends (1) that the matters set out in the counterclaim are not pleadable as such under sec. 2656, Stats. We shall not set out that section here. Suffice it to say that it provides that a counterclaim may be interposed where it sets out a cause of action arising out of a contract or transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. No contract or transaction is set forth in the complaint, but we think the cause of action set forth in the counterclaim is clearly connected with the subject of the action, as that is defined in *McArthur v. Moffet,* 143 Wis. 564, 128 N. W. 445. It is there laid down:

"In possessory and proprietary actions, whether involving real or personal property, the subject of action is composed of the plaintiff's primary right together with the specific property itself."

No useful purpose would be served by a reconsideration of this matter; it was there fully and elaborately considered and we adhere to the principles and doctrines there laid down.

The second contention of the plaintiff is that there is not a sufficient quantum of evidence to sustain a reformation of the deed by the terms of which the defendant assumed and agreed to pay the mortgage. The defendant is not here seeking to reform the deed or to rescind his contract, but alleges that the insertion of the clause by the terms of which he was to pay the mortgage was as to him a fraud; that he has suffered damage therefrom, and he seeks recovery of the damages. The jury has found upon this issue in favor of the defendant, under an instruction of the trial court that in

order to so find it must appear to the jury that the fact is established by a clear and satisfactory preponderance of the evidence. Upon this theory of the case, however, the verdict upon its face is fatally defective. There is no finding by the jury as to whether or not the defendant was negligent in accepting the written instrument in question, nor is there any express finding upon that matter by the court. However, in accordance with the provisions of sec. 2858*m*, Stats., this fact not having been brought to the attention of the trial court by a request, the fact must be deemed to have been found by the court against the plaintiff, in conformity with the judgment as provided therein.

It is also claimed that the judgment in this case is not in the proper form; that there are two judgments: one a judgment in favor of the plaintiff for the return of the property, the other a judgment in favor of the defendant for the amount of his damages.

Relief is often granted to both of the parties to an action. The fact that each party recovers does not make more than one final judgment. The defendant seems to have tried the issue raised by the counterclaim on the theory that he was entitled to recover on account of fraud committed by the plaintiff, and plaintiff to defend on that issue on the ground that there was no evidence sufficient to entitle the defendant to a reformation, that there was no prayer for reformation, and that therefore the defendant was concluded by the terms of the deed.

Here, however, no reformation is sought. The defendant is and will be bound to pay the amount of the mortgage. He recovers for his damages in this action for the fraud perpetrated upon him by the plaintiff, as found by the jury, and no question of the reformation of an instrument is involved. The instructions of the court to the jury laid down the true rule as established by the decisions of this court; that is, that recovery may be had in cases of fraud where the fraud is es-

tablished by a clear and satisfactory preponderance of the evidence. *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074; *Brennan v. Healy,* 157 Wis. 37, 145 N. W. 641.

By the Court.—Judgment affirmed.

STAHL, Appellant, vs. BROECKERT, imp., Respondent.

February 7—March 5, 1918.

Venue: Change: Form of demand: Consent: When order unnecessary: When defendants need not join in demand: Waiver of defects: Successive changes: Convenience of witnesses: Jurisdiction: Circuit courts: One court restraining proceedings in another: Supreme court: Supervisory control.

1. A demand for a change of the place of trial of an action brought in a county in which none of the defendants resided, asking that the trial "be had within the proper county, to wit," M. county, in which one of the defendants resided, *or* R. county, in which the others resided, and stating the facts as to such residence, was in proper form.
2. After such demand, a written consent seasonably served by plaintiff's attorneys that the place of trial be changed to R. county *ipso facto* changed the place, no order of the court being necessary; and it became the duty of plaintiff to procure the transmittal of the papers.
3. Where an action is not commenced in the proper county any defendant may demand that it be tried in the proper county, although the other defendants do not join in such demand.
4. Even if, in such case, it were necessary that all defendants join in the demand for a change of the place of trial, defendants who have not appeared in the action need not be joined.
5. In the case above stated, any defects in the application for a change of the place of trial were waived when plaintiff's attorneys noticed the case for trial in the circuit court for R. county and when they appeared in that court to oppose a motion for a change to M. county on account of the convenience of witnesses.
6. The circuit court for R. county having acquired jurisdiction of the action could again change the place of trial to M. county on account of the convenience of witnesses.

7. A circuit court which had dismissed, for want of prosecution, an action of which it had jurisdiction through valid changes of venue, cannot restrain the plaintiff from proceeding with the action in the circuit court in which it was originally commenced and which claims still to have jurisdiction thereof. The defendant, in such case, should appear in the last mentioned court and protest against further proceedings therein, and if that court persisted should invoke the supervisory control of the supreme court. KERWIN, VINJE, and ESCHWEILER, JJ., dissent.

APPEAL from an order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This action was commenced in the Milwaukee county circuit court by the service of summons early in the month of January, 1914, for the recovery of damages for fraud alleged to have been committed by the defendants on the plaintiff. Defendant *Broeckert* lived in Manitowoc county. The defendants Stahl lived in Racine county. January 8, 1914, *Broeckert's* attorneys served notice of retainer and appearance. January 20th complaint was served on *Broeckert's* attorneys. January 24th *Broeckert* served demand for change of place of trial to either Manitowoc or Racine county. January 29th plaintiff served a written consent to change the place of trial to Racine county. February 12th defendant *Broeckert* served his answer to the complaint, which was entitled in the circuit court for Racine county, and plaintiff's attorneys admitted service on such answer. Early in March plaintiff's attorneys served notice on attorneys for defendant *Broeckert* that said action would be brought to trial at the April term of the Racine county circuit court. Thereafter attorneys for *Broeckert* moved in the Racine county circuit court for an order changing the place of trial to Manitowoc county on the ground of convenience of witnesses. Plaintiff's attorneys appeared in the Racine county circuit court on the 20th day of March and opposed the motion, and on the 26th day of March the Racine court made an order transmitting the case to Manitowoc county after copies of

all pleadings and other papers in the case had been filed with the clerk of that court, the original papers not having been transmitted to that court from the Milwaukee circuit court.

On March 23d Judge HALSEY of the Milwaukee county circuit court issued an order requiring the defendant *Broeckert* to show cause why the proceedings relating to the change of place of trial from Milwaukee county should not be vacated and set aside and staying all proceedings in said action except to resist said motion. A copy of this order was mailed to *Broeckert's* attorneys, who returned it, refusing to accept service thereof. They did not appear to contest such order to show cause in the Milwaukee county circuit court. Upon the hearing of said order to show cause the Milwaukee court made an order vacating all proceedings relating to the change of the place of trial of said action from Milwaukee, and placed said cause on the April, 1914, calendar of the Milwaukee circuit court for trial as an issue of fact for the jury. May 23, 1914, defendant *Broeckert* served on plaintiff's attorneys notice of trial, entitling the case in the circuit court for Manitowoc county. Plaintiff's attorneys admitted service on this notice. On June 9, 1914, the case having been reached for trial on the Manitowoc calendar and plaintiff having failed to appear, the case was dismissed for want of prosecution. On or about the 11th day of May, 1917, the attorneys for the defendant *Broeckert* learned that the case was on the day calendar of the Milwaukee county circuit court and would soon be reached for trial. They then procured from the circuit court for Manitowoc county an order requiring the plaintiff to show cause why he should not be restrained from proceeding in the Milwaukee court. Upon the hearing of such order to show cause the Manitowoc county circuit court made an order restraining the plaintiff from proceeding further with the case in the Milwaukee county circuit court, and from that order the plaintiff appealed.

For the appellant the cause was submitted on the brief of *Lorenz & Lorenz* of Milwaukee.

For the respondent there was a brief by *Hougen & Brady* of Manitowoc, and oral argument by *A. L. Hougen.*

OWEN, J. The demand of *Broeckert* for a change of the place of trial to either Manitowoc or Racine counties was duly and seasonably made. The demand was that the trial "be had within the proper county, to wit, Manitowoc county or Racine county in the state of Wisconsin. The reason this demand is made is that the county designated in the summons and complaint in said action is not the proper place of trial therefor, because neither of the defendants at the time of nor before the service of the summons and complaint in said action was a resident of Milwaukee county. That said *William Broeckert,* defendant, at the time of and before the service of the summons and complaint in said action, was and still is a resident of said Manitowoc county and said defendants Hugo Stahl and Bertha Stahl, at the time of and before the service of the summons and complaint in said action, were and each of them was and they still are and each of them is a resident of Racine county, Wisconsin." The demand was in proper form. *Anderson v. Arpin H. L. Co.* 131 Wis. 34, 110 N. W. 788. Within the time required by sec. 2621, Stats., the plaintiff's attorneys served a written consent that the place of trial be changed to Racine county. This *ipso facto* changed the place of trial. No order of the court was necessary, and it became the duty of the plaintiff to procure a transmittal of the papers to the clerk of that court. *Woodward v. Hanchett,* 52 Wis. 482, 9 N. W. 468; *Tucker v. Grover,* 53 Wis. 53, 9 N. W. 820; *Anderson v. Arpin H. L. Co., supra.*

Objection is made to the jurisdiction of the Racine county circuit court because all defendants did not join in the application for change of the place of trial. It has been held

that all defendants, or all similarly situated, should join in an application for a change of venue on the ground of the prejudice of the judge. *Will of Rice,* 150 Wis. 401 (136 N. W. 956, 137 N. W. 778) at p. 455, and cases there cited. But it has not been so held, so far as we are aware, respecting an application for a change of the place of trial on the ground that the action was not commenced in the proper county, and we do not think that it should be. The statute prescribes the proper place of trial. When an action is commenced in an improper county it is in defiance of statutory provisions. The plaintiff has no right to have the action tried therein unless the right to have it tried in some proper county is waived by defendants through failure timely to take the necessary steps to have the place of trial changed. If any of the defendants demand that the action be tried in the proper county the plaintiff is in no position to object. He should have brought the action in the proper county in the first instance. He should not be permitted to profit by his disregard of statutory requirements and force a trial of the action in an improper county against the demand of any of the defendants that the action be had in the proper county. In other words, the statute fixes the proper place of trial, and any defendant has a right to have the action tried in some proper county, even though such right be not insisted upon or, for that matter, desired by all of the defendants.

Furthermore, it has been held that even where the application for a change of the place of trial is made upon the grounds of the prejudice of the judge, such defendants as have not appeared in the action need not join in the application. *Wolcott v. Wolcott,* 32 Wis. 53; *Eldred v. Becker,* 60 Wis. 48, 18 N. W. 720.

The statement is made in respondent's brief that the defendants Hugo J. and Bertha Stahl did not appear in the action. Appellant makes no denial of this statement. While the record discloses no proof of nonappearance on the part

of these defendants, there is nothing in the record to indicate that they ever did appear in the action. Under this state of the record we are justified in the conclusion that the Stahls defaulted, and even though it were necessary that all defendants unite in an application for a change of the place of trial on the ground that it was not commenced in the proper county, it was not necessary for the Stahls to join in this application, because they had made no appearance in the action.

But there is another very effectual answer to the contention of the appellant that the circuit court for Racine county did not acquire jurisdiction of the case. On March 2, 1914, plaintiff's attorneys served upon the attorney for the defendant *Broeckert* a notice that the action would be brought to trial at the April term of the circuit court for Racine county, commencing on the second Monday of April. They also appeared in the circuit court for Racine county on the 20th day of March to resist the motion of the defendant *Broeckert* for a change of the place of trial from Racine to Manitowoc county on account of the convenience of witnesses, at which time an affidavit made by Fred C. Lorenz, one of the attorneys for the plaintiff, was filed in opposition to the motion. These acts on the part of plaintiff's attorneys clearly recognized the jurisdiction of the Racine county circuit court and, upon the most elementary principles of law, constituted a waiver of any defects in the application for a change of the place of trial from Milwaukee county. *Montgomery v. Scott,* 32 Wis. 249; *Carpenter v. Shepardson,* 43 Wis. 406. We see no reason for doubting the jurisdiction of the Racine county circuit court. That court, having jurisdiction, could change the place of trial of the action to Manitowoc county on account of the convenience of witnesses. *Maher v. Davis & Starr L. Co.* 86 Wis. 530, 57 N. W. 357. The latter, therefore, acquired jurisdiction, and by its

judgment subsequently rendered effectually disposed of the case.

But we cannot indorse the practice here pursued, nor affirm the authority of the circuit court for Manitowoc county to interfere with the proceedings of the circuit court for Milwaukee county, as was attempted. We fully recognize the general power of courts of equity whose jurisdiction has once attached, to restrain parties from commencing and prosecuting subsequent actions in other courts for the same object. We have no disposition to question, qualify, or limit that power, but it cannot be invoked to justify the order appealed from. We have here a conflict between two courts as to which has jurisdiction of a particular case. Each has affirmatively asserted its own jurisdiction, thereby, inferentially, denying the jurisdiction of the other. They could not both have jurisdiction. One was wrong in the attitude assumed, and the other had neither power nor authority to correct the mistakes of the erring court. If the one justly having jurisdiction could, in the manner here attempted, restrain further proceedings in the other, then the erring court, being possessed of like weapons, could frustrate proceedings in the court having jurisdiction, for a time at least, in the same manner. It is not a sufficient answer to say that in such case the restraining order would be void and the party restrained would be at liberty to disregard it. Whether it would be void depends upon which court has jurisdiction, and a party to an action should not be placed in a position where he must decide at his peril a question on which two courts of equal dignity and standing disagree. Such practice may well lead to unseemly squabbles and controversies, the inevitable effect of which is loss of dignity and respect. There is no reason why the circuit court for Milwaukee county could not in form have restrained the defendant from taking any proceedings in the Manitowoc county circuit

court, and even after the circuit court for Manitowoc county issued its order to show cause why plaintiff should not be restrained from proceeding further with the case in the Milwaukee county circuit court, the Milwaukee court might have restrained the defendant from proceeding any further with his motion in the Manitowoc court. An injunction from one court may be met with an injunction from the other, and in the end both parties to the action are fettered by restraining orders until they cannot turn in any direction without the incurring of contempt penalties, and after each court has thoroughly spent itself nothing has been decided.

Supervisory control of circuit courts is vested exclusively in this court, and where a court persists in acting without jurisdiction this superintending power of control on the part of this court should be invoked. It was the duty of defendant *Broeckert* to appear in the circuit court for Milwaukee county and protest against the further jurisdiction of that court. It is not at all improbable that after full argument of the question the Milwaukee court would have been convinced and ceased further pretension of its jurisdiction. But if the circuit court for Milwaukee county persisted in its jurisdiction, the defendant should then have taken the proper steps to invoke the power of supervisory control lodged in this court. That this power has been freely exercised will be seen by reference to the following cases: *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081; *State ex rel. Forrestal v. Eschweiler,* 158 Wis. 25, 147 N. W. 1008; *State ex rel. Milwaukee v. Circuit Court,* 163 Wis. 445, 158 N. W. 92; *State ex rel. Carpenter v. Backus,* 165 Wis. 179, 161 N. W. 759; *State ex rel. N. W. Mut. L. Ins. Co. v. Circuit Court,* 165 Wis. 387, 162 N. W. 436.

We give assurance that there will be no hesitation here in exercising this power in the interests of orderly procedure and to prevent unseemly controversies between the

circuit courts of the state, under these or similar circumstances. For these reasons we cannot approve of the action of the Manitowoc circuit court in enjoining the plaintiff from proceeding further in the circuit court for Milwaukee county, and the order appealed from must, for such reasons, be reversed.

In view of the facts, however, that the defendant *Broeckert* was compelled to take some action challenging the jurisdiction of the Milwaukee court by reason of the plaintiff's persistence in that court, and the rights of the parties having been settled on this appeal, the defendant should not be mulcted in costs in this court, and appellant should not be allowed to tax costs.

By the Court.—Order appealed from is reversed, and cause remanded for further proceedings according to law. Respondent will pay the clerk's fees. No further costs to be taxed by either party.

KERWIN, J. (*dissenting in part*). I dissent from so much of the opinion of the majority of the court as holds that the order of the court below was an attempt by one circuit court to restrain another circuit court. The order here was against a party, not against the court. That a party may be restrained from prosecuting an action has been repeatedly held by this and other courts, and is the settled law of this state. *Akerly v. Vilas,* 15 Wis. 401; *Hadfield v. Bartlett,* 66 Wis. 634, 29 N. W. 639. See, also, 7 Ruling Case Law, 1070; 14 id. 408; 1 High, Injunctions (3d ed.) § 45 *et seq.;* 1 Joyce, Injunctions, § 544*a; Crowns v. Forest L. Co.* 102 Wis. 97, 78 N. W. 433; *Boring v. Ott,* 138 Wis. 260, 119 N. W. 865; *Balch v. Beach,* 119 Wis. 77, 95 N. W. 132; *Zohrlaut v. Mengelberg,* 158 Wis. 392, 148 N. W. 314, 149 N. W. 280.

I also dissent from the holding, or intimation, in the majority opinion to the effect that the remedy in the instant

case was by application to this court under its superintending control.

I therefore think the order should be affirmed.

VINJE and ESCHWEILER, JJ. We concur in the foregoing dissenting opinion of Justice KERWIN.

WISCONSIN LAKES ICE & CARTAGE COMPANY and another, Appellants, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

February 8—March 5, 1918.

Workmen's compensation: Scale of compensation: Statutes: Construction.

1. **Under sub. (5) (e), sec. 2394—9, Stats. 1915, an employee whose injury resulted in a fracture of the tibia and a permanent impairment of the use of his ankle might be awarded compensation for temporary total disability during the healing period, as well as for the subsequent permanent partial disability, even though he would thereby receive a larger sum than could be allowed, under sub. (5) (a) (28), sec. 2394—9, Stats. 1915, if he had lost his foot at the ankle.**
2. **Where the written law is plain, there is no room for construction even if results do not seem to be in accordance with exact justice.**

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

One *August Pankonen* was injured in his foot while in the employ of the *Wisconsin Lakes Ice & Cartage Company,* which company was insured against loss by the *Wisconsin Employers Exchange.* The injury resulted in a fracture of the tibia and a permanent impairment of the use of the ankle. Both employer and employee were under the provisions of the Workmen's Compensation Act. The *Industrial Com-*

mission allowed the employee sixty-two weeks' and two days' compensation for his temporary total disability and sixty per cent. of the compensation for loss of a foot at the ankle joint, less ten per cent. on account of the employee's age, for his permanent disability. This resulted in a total allowance for a period of 134 weeks and two days; or for fourteen weeks and two days more, it is claimed by the appellants, than could have been allowed under the schedule in sub. (5)(a)(28), sec. 2394—9, Stats. 1915, which provides for a compensation for 120 weeks for the loss of the foot at the ankle; and because of such alleged excess allowance the employer and insurance company appealed from the judgment of the circuit court affirming the award of the *Industrial Commission.*

For the appellants there were briefs by *Otjen & Otjen* of Milwaukee, and oral argument by *Henry H. Otjen.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

VINJE, J. The appellants claim that the *Industrial Commission* could not extend the period of compensation, including the healing period and permanent disability, beyond the period of 120 weeks allowed for a severance of the foot at the ankle; that it could not have been the intent of the legislature to allow more for a lesser than for a greater injury, and that the first sentence of sub. (5)(e), sec. 2394—9, Stats. 1915, is intended to limit the total compensation that can be awarded and the second sentence only specifies how it shall be computed. Both respondents and appellants agree that the injury comes under said sub. (5)(e), which reads:

"For all other injuries to the members of the body or its faculties which are specified in the foregoing schedule resulting in permanent disability, though the member be not actually severed or the faculty be totally lost, compensation shall bear such relation to that named in the schedule as the dis-

abilities bear to those produced by the injuries named in the schedule. Indemnity in such cases shall be determined by allowing weekly indemnity during the healing period resulting from the injury and the percentage of permanent disability resulting thereafter as found by the commission."

But the respondents claim that where there is a total loss of a member compensation can be made for a healing period as well as for the period specified in the schedule and this is now embodied in the law of 1917 (ch. 624), which provides a schedule including a healing period and permanent disability and allows for both compensation for 180 weeks for loss of a foot at the ankle. It is said the change was made to relieve the *Commission* from fixing a healing period in each case, as this was usually a disputed issue, and that under the present law, unless the employee can come in under sub. (5)(b), the whole healing period is included in the statutory schedule. Be this as it may, we agree with the trial court in its construction, saying:

"The last sentence of sub. (5)(e) provides that 'Indemnity in such cases shall be determined by allowing weekly indemnity during the healing period resulting from the injury and the percentage of permanent disability resulting thereafter as found by the commission.' The *Commission* have followed this provision literally in making the award here in question. The first sentence of this subdivision applies only to the compensation that shall be allowed for permanent disability and in no way affects the allowance that may be made for the healing period which must precede the time when permanent disability begins."

When the written law is plain there is no room for construction even if results do not seem to be in accordance with exact justice. *Mellen L. Co. v. Industrial Comm.* 154 Wis. 114, 142 N. W. 187. If under the law of 1915 a healing period can be allowed for in addition to the schedule period in case of a total loss of a member, no injustice results; if not, it would seem that generally no greater sum should be

allowed for an injury where a member is retained than where it is severed. But that is, within reasonable limits, purely a legislative question. Courts are bound by a plain constitutional statute.

By the Court.—Judgment affirmed.

OWEN, J., took no part.

RAYMOND, Respondent, vs. SAUK COUNTY, Appellant.

December 4, 1917—April 3, 1918.

Highways: Application of tar and oil: Injury from slippery condition: Contributory negligence: Notice of danger: Automobiles.

1. **One who, in broad daylight, knowingly drives his automobile over a highway which is at the time in a slippery and dangerous condition by reason of a recent application of tar and oil, is guilty of contributory negligence as a matter of law and cannot recover for injuries sustained by reason of such slippery condition.**
2. **The fact that the county highway commissioner did not, as he might under sub. 7, sec. 1317*m*—6, Stats., suspend travel on such highway, or that no warning, by putting up signs or otherwise, was given of its defective condition, cannot affect the rights of a traveler who from the visible condition of the road itself had notice of the danger.**

VINJE, J., WINSLOW, C. J., and SIEBECKER, J., dissent.

APPEAL from an order of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The appeal is from an order overruling a demurrer to the complaint.

The cause was submitted for the appellant on a brief signed by *James H. Hill,* district attorney, and *F. R. Bentley,* of counsel, both of Baraboo, and for the respondent on that of *Grotophorst, Thomas, Rieser & Quale* of Baraboo.

The following opinions were filed January 5, 1918:

ESCHWEILER, J. The plaintiff and his wife, while riding in an automobile at about noon on August 13, 1916, on the road from Baraboo to Kilbourn, near a bridge at Dell Creek, met with an accident causing personal injury to plaintiff and damage to his car by reason of its sliding off the highway into the ditch.

The plaintiff asserts that *Sauk County* became liable to him for such resultant damages on grounds which may be substantially stated as follows: That this was a county highway and was defective and out of repair by reason of the negligence of the servants of the county, in that on the preceding day the agents and servants of the defendant negligently and carelessly spread upon said highway, at the place in question, large quantities of tar and oil without covering the same with sand or other similar material; that the place is on a steep hill, and that by reason of said large quantities of tar and oil thus deposited on such highway the same became so slippery that cars could not be kept in the road, but slipped out of the main highway into the ditch; that the claimant at the time and place exercised due care and caution, not knowing the defective condition of said highway; and that in going down toward said bridge he struck the slippery place with his car, and that the said slippery condition caused the automobile to slide into the ditch and turn over. He alleges upon information and belief that many other cars prior to that time slid from the main highway into the ditch and were damaged; that the county knew or ought to have known the effects of placing upon the highways large quantities of oil and tar and that by spreading such large quantities upon said hill on said highway it was made unsafe and dangerous for public travel. He also alleges that the county was further negligent in not putting up signs or giving warning of such defective condition of the highway. To this claim or complaint the defendant de-

murred on the ground that it appeared on the face thereof that there were not sufficient facts stated to constitute a cause of action. The demurrer being overruled the defendant appealed.

No right of action can arise against a municipality in this state for accidents happening on the highway unless such liability is created by sec. 1339, Stats., there being no common-law liability. *Uecker v. Clyman,* 137 Wis. 38, 118 N. W. 247; *Maxwell v. Wellington,* 138 Wis. 607, 120 N. W. 505.

Sec. 1339, so far as material to the present case, provides that if any damage shall happen to any person or his property by reason of the insufficiency or want of repair of a road which any county shall have adopted as a county road and is by law bound to keep in repair, such county shall be liable therefor.

The fact that the county is making repairs does not relieve it from the necessity of exercising ordinary care to protect travelers on the highway from injury during the time of making such repairs. *Klatt v. Milwaukee,* 53 Wis. 196, 10 N. W. 162.

If a highway is discontinued or altered it is the duty of the municipality to erect and maintain suitable signals or barriers to warn travelers of the fact. *Bills v. Kaukauna,* 94 Wis. 310, 68 N. W. 992; *Hanson v. Clinton,* 156 Wis. 147, 145 N. W. 646.

Furthermore, a traveler has the right to assume that the duty of such municipality has been performed and that the public highway is reasonably safe for travel. *Seward v. Milford,* 21 Wis. 485; *Wall v. Highland,* 72 Wis. 435, 39 N. W. 560; *Simonds v. Baraboo,* 93 Wis. 40, 67 N. W. 40; note to 21 L. R. A. N. S. 623, 652.

A traveler may pass upon such a highway while knowing that it is in some respects defective, if nevertheless he exercises ordinary care in the use of such highway in view of its defective condition, and such use is not of itself, as a matter

of law, contributory negligence. *Schmidt v. Franklin,* 164 Wis. 128, 159 N. W. 724; *Jenewein v. Irving,* 122 Wis. 228, 99 N. W. 346, 903.

But under all situations the plaintiff himself must exercise ordinary care for his own safety.

A standard has been pretty definitely asserted by prior decisions of this court as to what is the ordinary care required of the driver of an automobile on the public highway in this state.

In *Lauson v. Fond du Lac,* 141 Wis. 57, 123 N. W. 629, and *Pietsch v. McCarthy,* 159 Wis. 251, 150 N. W. 482, it was held that a person in driving his automobile on the highways must maintain such rate of speed that he can bring it to a standstill within the distance that he can plainly see the objects or obstacles ahead of him, and that failure to so operate the automobile is want of ordinary care. Both of these cases cited involved injuries at night and the question of the use of lights on the automobiles for illuminating the highway ahead of them, but we see no good reason for not holding that the same standard applies for the daytime, and that the rule of ordinary care as between the municipality and the driver of an automobile on the public highway requires that such driver shall have the automobile under such control that he can bring it to a stop within the distance within which he can plainly see obstacles or dangers ahead of him.

It is only necessary in this case to determine the one question of whether or not, giving the complaint the most liberal construction possible, it appears upon the face thereof, as a matter of law, that there was such contributory negligence on the part of the driver that it will prevent his recovery.

The plaintiff in this case must stand charged as a matter of law with what is common knowledge, namely, that tar and oil just spread upon a highway creates a slippery and therefore dangerous condition, and that such substances so spread upon a highway are plainly visible to the traveler in the day-

time. There is nothing in the complaint from which there can be spelled out anything else than that the slippery condition caused by the placing of the tar and oil on the highway caused the automobile to go into the ditch. An allegation that the plaintiff does not know of the defective condition of the highway from such cause cannot be held to obliterate such common knowledge any more than could an allegation, if made, that such substances spread on a highway are not visible in the daytime. The driver of an automobile who, in broad daylight, knowingly drives his automobile over a highway for the time made in a slippery and dangerous condition by reason of the application of tar and oil upon the same, must take the responsibility for accidents happening to him by reason of such slippery condition. He is chargeable, therefore, with contributory negligence for the resultant injury as a matter of law.

The fact that under sub. 7, sec. 1317*m*—6, Stats., the county highway commissioner had power, in his discretion, to suspend the right to travel on any highway in process of repair by posting notices forbidding such travel, or that there may have been negligence on the part of the county in not putting up signs or giving other warning of such defective condition, cannot help the position of the plaintiff. Such signs or warning are for the purpose only of giving to the traveler notice of the existence of any defect or danger. In the case before us he had this notice from the condition of the road itself. That the county might have given cumulative notice of the danger cannot help him. Upon the face of the complaint the demurrer should have been sustained.

By the Court.—The order of the circuit court is reversed, and the cause remanded for further proceedings.

VINJE, J. (*dissenting*). I am unable to concur in the view that plaintiff was negligent as a matter of law in driving upon the oiled part of the highway. Oiled highways

may be and are driven upon before sand is applied. It is not pleasant to do so, but reasonably safe under ordinary conditions, and often, as in this case, necessary because the whole width of the passable part of the highway is oiled and no other route is available. It is conceded that plaintiff could and should have seen the oil on the road before entering upon the same, and I construe the complaint to allege a voluntary entrance thereon. But the complaint alleges that the oil and tar were applied in such large quantities that it was impossible to keep a car in the road, and that plaintiff was not aware of this defective condition caused by an excess of tar and oil. I see nothing improbable or self-contradictory in such allegation. Why may not the defendant, as is alleged, have been negligent in applying the tar and oil? Is it impossible to apply too much? If not, why should plaintiff be denied a chance to prove that alleged fact? That tar and oil on the road may be seen at a distance is obvious; but that it may be determined from a distance that there is so much tar and oil thereon that cars cannot be made to stay in the road is not so obvious. And when plaintiff alleges that, unknown to him, such a condition of the road existed, he should be permitted to offer proof in support of his allegations. That he may probably fail to sustain them is immaterial on demurrer. If, however, he does sustain them, then he cannot be held to have assumed the risk resulting from the excessive oiling, because such risk could not be ascertained till too late to avoid it. The complaint, if possible, must be construed to state a cause of action, not to fall short thereof.

I am authorized to state that Chief Justice WINSLOW and Mr. Justice SIEBECKER concur in this dissent.

A motion for a rehearing was denied, with $25 costs, on April 3, 1918.

OWEN, J., took no part.

PETERS, Administratrix, Respondent, vs. NATIONAL SURETY COMPANY, Appellant.

December 7, 1917—April 3, 1918.

Contracts: Construction: Failure of contractors for government work: New contract with surety: Subletting: Assignment: Extent of surety's liability: "Hold-backs" and penalties under original contract: Use of original contractors' plant: Superior claims: Deductions by government for materials, etc., bought by it: Waiver of claim: Admissions: Engineer's certificate as to completion of work: Duty to obtain: Discharge of liens, etc.: Condition precedent to action: Expense of collecting moneys from government: Counterclaim: Action, who may maintain: Partnership between corporation and individual: Dissolution of corporation: Interest, from what time computed.

1. O. & C., after partially completing certain work which they had contracted to do for the United States government, became bankrupt, and the government, under the contract, took possession of the work and of all materials, tools, animals, etc., which the contractors had been using thereon. Defendant company, which was surety on the bond of O. & C., thereafter made with plaintiffs the contract in suit, which was to be effective only in case defendant should make, as it in fact did, a new contract (known as the Garfield contract) with the government for the completion of the work by defendant in accordance with the original contract of O. & C. but with an extension of time. The contract in suit provided that plaintiffs should complete the work begun by O. & C. in the same manner as if they had been the original contractors, and that "the moneys to be paid" to them "therefor shall be the sum or balance to be paid by the United States under the contract of" O. & C., "which sum or balance is understood to be $641,137.34, to which is to be added and paid by the United States" certain "hold-backs" (*i. e.* percentages reserved when payments were made to O. & C.) aggregating $45,000, and certain penalties (incurred by O. & C. for delays) aggregating $7,050; "and the further sum of $14,050 to be paid by the" defendant to plaintiffs. It was provided that defendant should assign all warrants and pay over to plaintiffs all money received by it from the United States upon estimates of work done and for hold-backs and penalties, and, in addition, pay to plaintiffs "the sum of $14,050 and no more, which latter sum shall be in full for all other obligations and liabilities" of the defendant to the plaint-

iffs; and that it was the true intent of the parties that plaintiffs should "look to the payments to be made by the United States for their compensation," and that defendant should not be liable to plaintiffs for any greater sum than $14,050. *Held*, that defendant assumed an absolute liability to plaintiffs for the sum of $14,050 only, and not for the balance unpaid by the government on the contract of O. & C. or for the hold-backs or penalties, but that defendant was not a mere trustee for plaintiffs or a mere conduit through which the money paid by the government was to pass to them, and was bound to use reasonable diligence to collect moneys due to it under the Garfield contract; and that each party was bound to assist, whenever necessary, in taking the required steps to obtain the amount which the government was willing to pay for the work as it went on or which should finally become due on the completion of the work.

2. Plaintiffs were not mere assignees of the Garfield contract between defendant and the government, an assignment of such a contract being prohibited by the federal statute; and neither party can be heard to assert that there was in effect such an assignment.
3. Upon the evidence showing that plaintiffs received and retained without protest a copy of said Garfield contract between defendant and the government, it is *held* that they were chargeable with knowledge of its contents, and cannot be heard to say that they relied upon telegrams from defendant which might have led them to a different understanding as to its contents.
4. The Garfield contract not having provided in any way that the government would pay to defendant the penalties of $7,050 which had been incurred by O. & C., and there having been no suggestion on the part of the government that it would pay or remit said penalties, and plaintiffs not having, prior to the final settlement between the government and defendant under said contract, suggested or demanded that defendant require such a favor from the government, the defendant is not liable to plaintiffs for the amount of such penalties. Defendant cannot be held so liable on the speculative theory that such a favor might have been granted if some one had asked for it.
5. By the Garfield contract the government permitted defendant to have the possession and use of the material, tools, animals, etc., which had been used on the work by O. & C., and by the contract in suit defendant agreed that plaintiffs might have the use, without charge during the progress of the work, of said property of O. & C. of which the government had taken possession, and further agreed that it would protect and defend plaintiffs

against a superior claim on the part of any other person affecting the possession of any of said property. Afterwards one Y. claimed to be the owner of a part of the property so turned over to plaintiffs, and after some controversy in which the government declined to take any part, and after defendant had denied any responsibility in the matter, plaintiffs bought from Y. the property claimed by him and thereafter sold part of it so that the net cost to them was $4,469.47. *Held* that, construing the contract in the light of the evidence, defendant's guaranty to plaintiffs of possession and use was not limited to property actually owned by O. & C., but extended to the property in question which was in the possession of and used by O. & C. and was afterwards taken possession of by the government; and hence that defendant was properly held liable for the net cost to plaintiffs of the Y. property.

6. Defendant having elected to deny all responsibility in the matter of Y.'s claim, was bound by such election and was not thereafter entitled to have the plaintiffs tender to it the defense of any lawsuit between them and Y.

7. After the government had taken possession of the work left incomplete by O. & C. it continued such work for a time and purchased further materials and supplies, some of which were at the work and were turned over to plaintiffs after the contract in suit was made. Both plaintiffs and defendant assumed that these were a part of the plant, but a deduction therefor was made by the government in the first statement or estimate upon which a payment was made to defendant under the Garfield contract, and the same item appeared as a deduction in the subsequent estimates. A finding of the trial court that the claim of the government as to this property was a superior claim against which defendant had agreed to protect plaintiffs, and its conclusion that defendant was liable for the amount so deducted by the government, are *held* to be sustained by the evidence.

8. Mere tacit acquiescence by plaintiffs in said deduction so far as the government was concerned in its dealings with defendant under the Garfield contract did not amount to a waiver of their claim as against the defendant under the contract in suit.

9. An unqualified admission by defendant of a liability as to both of the items above mentioned (the property claimed by Y. and the deduction made by the government), although not for the full amounts claimed by plaintiffs, was a substantial ground for the findings and conclusions of the trial court in respect to said items.

10. The filing, with the government, of a certificate of the govern-

ment engineer as to the completion of the work, though required by the Garfield contract and by the original contract with O. & C., was not a condition precedent to defendant's liability, under the contract in suit, to make payments to plaintiffs. The requirement as to such certificate was for the protection of the government, and the duty to obtain it rested primarily upon the defendant.

11. Although by the contract in suit plaintiffs agreed to pay for all materials, labor, and supplies furnished or used in the work and to discharge any attachments or liens therefor, such payment and discharge was not a condition precedent to their right to maintain this action for the balance due them under the contract; the defendant having ample security by withholding funds sufficient to cover the unpaid claims, or by requiring the claimants to be made parties to the action.

12. Upon completion of the work, the government officials decided that the hold-backs above mentioned should properly be paid to the trustee in bankruptcy of the original contractors, O. & C. Thereupon defendant, after consultation with plaintiffs, brought and successfully prosecuted an action to recover such hold-backs, and the amount thereof was paid to it as provided in the Garfield contract. *Held*, that the steps so taken by defendant to obtain said moneys were a part of its obligation to the plaintiffs and that it was not entitled to have the expenses incurred in prosecuting said action allowed to it as a counterclaim against the plaintiffs.

13. A corporation and an individual together contracted to do certain work. After the work had been completed and after an action by both the corporation and the individual as plaintiffs had been brought against the other party to the contract for a balance due thereon, the corporation was dissolved and three years later, under sec. 1764, Stats., ceased to be a body corporate for any purpose. Thereafter the individual plaintiff died, and the action was revived in the name of his administratrix as sole plaintiff. *Held*, that whatever interest and ownership there was in the funds in question passed on the death of the corporation, as it would have passed on the death of an individual copartner, to the surviving partner, so far at least as the defendant was concerned, and that the amount recovered in the action is properly payable to the plaintiff administratrix.

14. For the collection by defendant of the amounts due from the government upon completion of the Garfield contract and payment thereof to plaintiffs, thirty days after the final estimate is *held* to be a reasonable time, and defendant should not be held liable for interest upon said amounts prior to the expiration of said thirty days.

15. As to the deduction made by the government, as above stated, in the estimates under the Garfield contract, on account of "supplies and materials purchased by the United States and turned over to" defendant, the language of such item did not necessarily, as a matter of law, notify defendant that such a deduction was a superior claim against the property turned over to plaintiffs, for which it must be responsible under the contract in suit, or that it must forthwith pay such sum to plaintiffs in order to avoid liability; and no demand for the payment of said sum having been made by plaintiffs prior to the commencement of this action, defendant should be charged with interest thereon only from the date of such commencement.

ESCHWEILER and KERWIN, JJ., dissent in part (on motion for rehearing).

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Modified and affirmed.*

The defendant was surety on a bond of $120,000, given to the United States government to secure proper performance by the firm of Orman & Crook on work to be done on a large dam and distribution canals called the Belle Fourche project in South Dakota under a contract made in November, 1905. The contractors carried on that work until they went into bankruptcy in January, 1908. The United States government, under the conditions of that contract, took possession of the work and all the tools and materials that had been used by the contractors on said work and continued to carry it on for a time. The defendant, to relieve itself as much as possible from its obligation under the bond, undertook to find some contractor experienced in such class of work to complete the contract. After negotiations with a number of contractors, a contract was made on April 2, 1908, between Hayes Brothers Company, a corporation, and John W. Peters, both of Janesville, Wisconsin (who are hereinafter, for convenience, designated as the plaintiffs). The material parts of said contract are as follows:

It recited the making of the contract of November 14, 1905, between the United States of America and Orman &

Crook; that the defendant had been surety on the same; attached to and made a part of the contract copies of the advertisements, proposals, specifications in connection with and the contract of Orman & Crook; that the work undertaken by Orman & Crook had been partially completed and that they had gone into bankruptcy and discontinued work; that the United States government had under said contract taken possession of all machinery, tools, appliances, and animals employed on the said work and of all materials belonging to Orman & Crook which had been delivered on the ground; that the secretary of the interior on behalf of the United States government was authorized to employ other parties to carry on the contract and desired the defendant as such surety to complete the contract and is willing to enter into a contract for such purpose upon the defendant furnishing the secretary with satisfactory contractors to complete the said work for the defendant; that plaintiffs have examined the previous advertisements, specifications, and contract and the plans and profiles in connection therewith, and that they are wholly familiar with the same; that they have visited the work concerned and agree that they are wholly familiar with the character and amount of the work left uncompleted and what remains to be completed by the defendant as surety; that they have also inspected the plant and materials of said Orman & Crook so taken into possession by the government and are wholly familiar with the character and condition of the plant and material. It contained a provision for the extension of time as to one branch of the work; that the aggregate agreed price for all the work to be paid by Orman & Crook for completion thereof is $1,003,299.25, upon which there had been paid to Orman & Crook $310,111.91, leaving as balance on the contract price $693,187.34 yet to be paid by the United States of America for the completion of the work, in which balance is included the amount of $45,000 (designated as hold-backs) and penalties charged against Or-

man & Crook of $7,050 for failure to complete certain portions of the work within the contract time, but which penalties the defendant was advised may thereafter be remitted by the United States of America and paid to the defendant additional to the estimates for completed work when the whole work has been completed. (The terms "hold-backs" and "penalties" are explained later.) That the plaintiffs have agreed with the defendant to complete the whole of the work left uncompleted upon the terms and conditions thereinafter in said contract stated. These terms and conditions are substantially as follows:

The plaintiffs agree to promptly and diligently complete the work within a certain time and in the manner and pursuant to the terms and conditions in the Orman & Crook contract and in accordance with the requirements of the specifications, plans, and profiles, and to pay for all material, labor, and supplies furnished, used, or necessary in, upon, or about said work purchased by the plaintiffs hereto, and to discharge any attachments or liens that may be filed by any one furnishing the plaintiffs with such materials, labor, and supplies.

"The moneys to be paid the contractors [the plaintiffs] therefor shall be the sum or balance to be paid by the United States of America under the contract of Orman & Crook, and which sum or balance is understood to be $641,137.34, to which is to be added and paid by the United States of America the hold-backs on schedules 1 and 2 as above set forth, aggregating $45,000, and penalties aggregating $7,050; and the further sum of $14,050 to be paid by the company to the contractors as hereinafter set forth."

Article II of the contract is as follows:

"The contractors shall have the use of the plant, horses, mules, and materials of Orman & Crook taken into possession by the secretary upon the suspension of the contract of Orman & Crook, as aforesaid, an inventory of which is now or may be hereafter annexed, marked schedule 'A,' the contractors at the completion of the work herein agreed to be

done, or upon the default by the contractors, resulting in the further suspension of the contract by the United States of America, or the company, to return at the place where received, the plant, horses, mules, and the materials, if any there be left, to the company in as good condition as reasonable wear and tear occurring in the progress of the work will permit. The company agrees that the contractors shall have the use of said property without charge during the progress of said work and until completion thereof, and will protect and defend the contractor against a superior claim on the part of any other person affecting the possession of any of said property."

By the third article the plaintiffs agreed to furnish to the defendant, on or before April 10, 1908, a bond for $90,000 conditioned for the faithful performance of the contract by the plaintiffs.

By the fourth article the defendant agreed to procure from the United States of America the right to the plaintiffs to the use without charge of the said plant, horses and mules, and materials of Orman & Crook taken into possession upon suspension of the contract of Orman & Crook, until completion of the work, and to procure an extension of time for the completion of a portion of such work.

Article V is as follows:

"The company agrees to assign all warrants and to pay over to the contractors all money received by the company from the United States of America upon estimates of work done by the contractors under said contract of Orman & Crook, and to assign all warrants and to pay over all moneys received by the company from the United States of America for hold-backs on schedules 1 and 2 and for penalties charged against Orman & Crook as aforesaid, within five days after such warrants or payments or any of them shall have been received by the company, and, in addition thereto, the company agrees to pay the contractors the sum of fourteen thousand and fifty (14,050) dollars, and no more, which latter sum shall be in full for all other obligations and liabilities of the company to the contractors, seven thousand dollars

($7,000) thereof on or before May 20, 1908, and the balance, seven thousand and fifty (7,050) dollars, on or before October 20, 1908."

In article VI it was agreed that the plaintiffs undertook no liability for material or labor claims unpaid by said Orman & Crook.

By article VII provisions were made in case of failure on the part of the plaintiffs to carry on the work.

Articles VIII and IX were with reference to conditions not material here.

Articles X, XI, and XII are as follows:

"X. This contract shall be subject to all the terms of the specifications and of the contract of Orman & Crook hereto annexed and to the plans and profiles on file in the office of the United States reclamation service relating to said work herein agreed to be done, it being the true intent of the parties hereto that the contractors shall be bound thereby for the completion of the uncompleted work, aforesaid, in the same manner as if they had been the contractors with the United States of America in the place of Orman & Crook, and said contractors shall look to the payments to be made by the United States of America for their compensation for all work done hereunder, and the company shall not be liable to the contractors for any greater sum than fourteen thousand and fifty (14,050) dollars, as aforesaid, except as hereinbefore expressly agreed.

"XI. Should the United States of America fail or refuse to enter into contract with the company on or before April 10, 1908, for the completion of said work as herein agreed, including provision for the use by the company of the plant, the extending of the time for the completion of schedule 1 to December 1, 1910, and for the payment of forty-five thousand (45,000) dollars hold-back hereinafter referred to upon the completion of said contract, and waiving any forfeiture thereof to the said United States and upon the same terms as to prices for the uncompleted work as provided in the contract of Orman & Crook, this contract shall immediately cease and become null and void.

"XII. The company agrees to furnish to the contractors on

or before April 10, 1908, a copy of the contract entered into between the United States of America and the company for the completion of the work hereinbefore referred to."

Among the specifications in the original contract of Orman & Crook and made a part of the contract before us it was provided that in case of any contingency such as did in fact arise, the secretary of the interior shall have the power to suspend the operation of the contract and may have possession of all material, tools, appliances, and animals employed on any of the works to be constructed under the contract and of all materials belonging to the contractor delivered on the grounds, and may use the same to complete the work or may employ others to carry the contract to completion, substitute their machinery or material or purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials, and animals at the contractors' expense as may be necessary for the proper conduct of the work and for finishing it in the time agreed upon.

Specification No. 38 of the Orman & Crook contract was as follows:

"38. *Payments.* The payments due shall be made to the contractor upon the presentation of proper accounts, prepared by the engineer and approved by the chief engineer, in accordance with the provisions made therefor and pertaining to the contract. When the work has been completed or all the material has been delivered, to the satisfaction of the chief engineer, and when a release of all claims against the United States on account of the contract shall have been executed by the contractor, final payment of the balance due will be made."

By specification No. 103 provision was made for a deduction of $50 per day from the amount due on the contract for each of the different schedules or divisions of the work for each and every day the work remains uncompleted, as liquidated damages for loss to the United States on account of such delay. This sum will include the value to the United States

of the use of the work as well as the cost of engineering, superintendence, etc. The $7,050 designated as penalties under the foregoing contract between the parties was assessed and held back under this paragraph 103.

A further provision as to estimates and payments is found in paragraph No. 104 of such specifications and is as follows:

"104. *Estimates and payments.* Payments will be made as follows: At the end of each calendar month the engineer shall make an approximate measurement of all the work done or materials delivered up to that date, and an estimate of the value of the same, at the prices agreed upon in the contract. A deduction of twenty per cent. shall be made from this estimated amount, and from the balance shall be deducted the amount of all previous payments. The remainder shall be paid to the contractor upon the presentation of proper accounts, prepared by the engineer and approved by the chief engineer. The twenty per cent. so deducted shall be retained by the government until the work shall have been completed to the entire satisfaction of the chief engineer, and in case of default by the contractor said twenty per cent. shall be and become the sole and absolute property of the United States. In the case of schedule No. 1, after the amount so retained equals $40,000 the contractor shall be paid the full value of the work done or the materials delivered during each month, and in the case of each of schedules Nos. 2 and 3, after the amount retained equals $5,000 the foregoing deduction of twenty per cent. shall no longer be made, but the contractor shall be paid the full value of the work done or materials delivered during each month. The balance due upon completion of the contract shall be paid as provided in paragraph 38."

The $45,000 designated as hold-backs in the foregoing contract is what is referred to in this paragraph 104 (and is ultimately determined by the government to be the sum of $44,768.22 and so found by the court below).

After the signing of the contract on April 2d the vice-president and counsel of the defendant, a Mr. Griffin, who appeared to have acted for defendant all through these pro-

ceedings, proceeded to Washington to arrange for the obtaining of the contract between the defendant and the government for the carrying on of the work, and on April 6th he telegraphed from Washington to plaintiffs at Janesville as follows:

"*National Surety Co.* to Hayes Brothers Co. at Janesville. On Orman & Crook work government agrees upon completion of contract the retained percentage under paragraph one hundred four of specifications shall subject to provisions of Orman & Crook contract be paid to proper party in interest. Other requirements agreed to wire your approval how soon will you deliver bond answer."

To this the plaintiffs replied on the same day as follows:

"Hayes Bros. to *National Surety Co.* at New York. We stand on our contract and insist that we be assured payment of hold-back be made to you and by you assigned to us, or that you guarantee same. Bond ready."

On April 8th Griffin sent two telegrams from Washington of substantially the same import, one reading as follows:

"Griffin to Hayes Bros. Co. at Janesville. Government agrees to payment hold-back to company and other requirements. Mail your bond to company New York immediately wiring name of surety company copy contract between government and company mailed today."

On April 8th a contract was made between the defendant and the United States government, the latter acting through the Honorable James R. Garfield, secretary of the interior, and which is hereinafter designated as the Garfield contract. It referred to the contract of November, 1905, between Orman & Crook and the United States for the doing of the work, that the time for completing certain of the work was extended to December 1, 1910, and that the defendant should be allowed the use without charge of all machinery, tools, appliances, and animals taken over by the United States under the Orman & Crook contract, and that in consideration of performance by the defendant it shall be paid upon the

presentation of proper accounts prepared by the engineer and approved by the chief engineer as provided in paragraphs 38 and 104 of the specifications of the 1905 contract; and further provided:

"Upon completion of the contract the percentage heretofore retained under the provisions of paragraph 104 of the specifications shall, subject to the provisions of the said contract of November 14, 1905, be paid to the proper party in interest, viz. the party of the second part," *i. e.* the defendant.

It also provided, under the requirements of sec. 3737, R. S. of U. S., that neither the contract nor any interest therein shall be transferred to any other party or parties and that any such transfer shall cause the annulment of the contract so far as the United States is concerned.

There was no provision in this contract with the government by which it agreed to pay the so-called penalties of $7,050.

On April 10th a registry receipt was signed by the bookkeeper of the plaintiffs at Janesville for a letter claimed by defendant to have contained a copy of this Garfield contract.

The plaintiffs left Janesville on the evening of April 11th for the work, and after some delay subsequent to their arrival there had possession of the work and of the property then held and used by the government turned over to them about April 21st. They proceeded with said work and about June 1st notified defendant that claim had been made by one Mark Young to a portion of the property, including horses, mules, and certain materials or supplies which had been received by plaintiffs from the government on April 21st. Considerable negotiations were had between the parties with reference to that claim, as is more particularly set forth in the opinion.

The work was substantially completed about the 1st of July, 1911.

Itemized monthly statements were sent to plaintiffs by the United States government and postal-card notices of the monthly amounts also mailed to defendant until about September, 1909, when a change of method was instituted and thereafter the estimates or statements were also sent to defendant, and forwarded by it to plaintiffs, upon which payments were made by the United States government from time to time to defendant as the work progressed, and as made to it forwarded to plaintiffs. On each of such statements appeared an item showing a deduction of $4,594.87 for materials and supplies. On December 21, 1911, a so-called final estimate was made on behalf of the government. Whether the same was at that time mailed to the defendant was in dispute between the parties. After considerable correspondence between the parties and complaint on the part of the plaintiffs of delay in the payment finally due under this contract, a copy of this estimate was received in July, 1913, by defendant, sent by it to plaintiffs, and by them returned to defendant, who executed a final release as required by the government and sent the same to the proper officials. Subsequently, upon an opinion of the comptroller of the treasury, the government refused to pay to defendant the so-called hold-backs, claiming that the same should properly belong, under the Orman & Crook contract, to the trustee in bankruptcy for Orman & Crook in the bankruptcy proceedings at Denver, Colorado, of that firm; and further notifying defendant that unless some other disposition were made by agreement with such trustee or by legal proceedings, such payment would be made to the trustee in February, 1914.

Before that date a conference was had between the parties hereto and their respective counsel, and thereafter suit was brought in the district court of the District of Columbia making the proper government officials parties as well as the trustee in bankruptcy, and the result thereof is more particularly referred to in the opinion.

This action was commenced December 3, 1913. Several supplementary answers were interposed and postponements had of the trial of said cause from time to time. After proceedings had been taken by the Hayes Brothers Company to dissolve and the death of the individual plaintiff, the action was revived or continued in the name of the present plaintiff, the administratrix of the deceased, John W. Peters. A plea in abatement was interposed, more particularly treated of in the opinion.

At the close of the trial the court determined that the contract between the parties created an absolute liability on the part of defendant to pay to plaintiffs the amount that is mentioned in their contract as being due from the United States to Orman & Crook; giving the defendant a reasonable time before payment to receive the money from the United States. He awarded damages in accordance with such determination for principal and interest, which, with the costs and disbursements of $114.28, totaled $87,473.45. The items thereof, for convenience of reference hereinafter, were substantially as follows:

1. $7,050, being the so-called penalties under the Orman & Crook contract;

2. Interest on that sum from December 21, 1911;

3. $4,469.47, the so-called Young claim;

4. Interest on that amount on various items thereof, starting from August 26, 1908, the time of the purchase of the Young claim;

5. $4,594.87, the so-called government deduction for materials and supplies purchased by the government and used in carrying on the work or turned over to plaintiffs April 21, 1908;

6. Interest on that sum from September 30, 1908, the date of the first statement by the government;

7. $44,768.22, so-called hold-backs, being the amount referred to in the contract as $45,000;

8. Interest on said sum from December 21, 1911, to entry of judgment;

9. Interest from December 21, 1911, to August 28, 1914,

on $24,860.08, amount allowed in final settlement and paid over to plaintiff August 28, 1914.

Defendant appealed to this court from such judgment upon appropriate exceptions being taken.

For the appellant there were briefs by *Miller, Mack & Fairchild,* and oral argument by *J. G. Hardgrove,* all of Milwaukee.

For the respondent there was a brief by *Charles E. Pierce* and *Jeffris, Mouat, Oestreich & Avery* of Janesville, and oral argument by *Mr. Pierce, Mr. O. A. Oestreich,* and *Mr. M. G. Jeffris.*

The following opinion was filed January 5, 1918:

ESCHWEILER, J. Probably much of the complication and long delays that have arisen in this litigation may be ascribed to the fact that each of the parties to the contract of April 2, 1908, from the first time any question arose thereunder, seemingly took diametrically opposed views as to their respective rights and liabilities. The trial court adopted the plaintiffs' view, namely, that there was an absolute liability under that contract to pay to plaintiffs the amount mentioned therein on account of the work, without regard to the fact as to whether the United States government paid such amount for the same work or not. In coming to this conclusion much reliance was placed upon language found in paragraph I of the contract reading as follows:

"The moneys to be paid the contractors therefor shall be the sum or balance to be paid by the United States of America under the contract of Orman & Crook aforesaid, and which sum or balance is understood to be $641,137.34, to which is to be added and paid by the United States of America the hold-backs on schedules 1 and 2 as above set forth, aggregating $45,000, and penalties aggregating $7,050, and the further sum of $14,050 to be paid by the company to the contractors as hereinafter set forth."

From this language it is argued that there was assumed

by the defendant an absolute liability to the full extent of the gross amount mentioned therein, together with the hold-backs of $45,000, the penalties of $7,050, and the further sum of $14,050. There are, however, other provisions in the contract which must be considered in order to arrive at the legal effect of the instrument.

By paragraph V the defendant agreed to assign all warrants and pay over to plaintiffs all moneys received by it from the United States upon estimates of work done under the contract of Orman & Crook and to assign all warrants and pay over all moneys received by the defendant from the United States for hold-backs and for penalties charged against Orman & Crook, within five days after such warrants or payments, or any of them, shall have been received by the defendant, and in addition thereto the defendant agreed to pay the plaintiffs $14,050 and no more, which latter sum shall be in full for all other obligations and liabilities of the defendant to the plaintiffs; and there is further in paragraph X very significant language to the effect that it is the true intent of the parties that the plaintiffs shall be bound for the completion of the uncompleted work in the same manner as if they had been the contractors with the United States instead of Orman & Crook, and that said plaintiffs shall look to the payments to be made by the United States for their compensation for all work done under such contract, and the company shall not be liable to the contractors for any greater sum than $14,050, except as was thereinbefore expressly agreed.

From the four corners of this instrument we construe it as fixing an absolute liability on the part of the defendant to pay the sum of $14,050; that the compensation for doing the work should be all the moneys that should be paid out by the United States government for or on account of the work required by it in order to complete the Belle Fourche project; that each party was under an implied obligation to as-

sist, wherever necessary, in taking the required steps to obtain from the government the amount that the government was willing to pay for the work as it went on or which should finally become due on the completion of the work; that it was incumbent upon the defendant to use reasonable diligence to collect from the government the sums of money that became due from the government to it under the Garfield contract, and then to assign the warrants or pay over the amounts within five days after the same should have been so collected by reasonable diligence from the government. Neither party had the right to sit back and insist that it was incumbent upon the other party to take all the steps necessary to obtain from the government the moneys for such work.

The defendant was not, as it contends, a mere trustee for the plaintiffs or a mere conduit through which the money was to pass from the government to the plaintiffs, nor were the plaintiffs mere assignees of the Garfield contract, because an assignment of such a contract is absolutely prohibited by sec. 6890, U. S. Comp. Stats., and neither party can be heard to assert that there was in effect such an assignment, for what cannot be permitted to be done directly will not be permitted to be done indirectly.

The United States government obligated itself, under the Garfield contract, to pay defendant, not the plaintiffs, and the defendant was the only one in position to demand the money for the work done. It either had the absolute duty to pay the whole amount due for the work or the implied duty to see to it that the work was paid for in such amount as the United States government should allow. It could not occupy the reputed position of Mahomet's coffin.

Were authorities necessary to sustain this construction of defendant's obligation they are at hand. *Rumsey v. Livers,* 112 Md. 546, 77 Atl. 295; *Vermont M. Co. v. Mann,* 36 Vt. 697; *White v. Snell,* 9 Pick. (26 Mass.) 16.

We are not unmindful of the contentions made by the parties with respect to the telegram of April 6th and the two telegrams of April 8, 1908, from Mr. Griffin at Washington on behalf of defendant to plaintiffs, to the effect that the government agreed to the payment of the "hold-backs" and "other requirements," and from which latter expression it is insisted by plaintiffs that they were entitled to consider that the requirement as to the payment of the penalties of $7,050 had also been agreed to by the United States government. But we feel that the consideration of the language of these telegrams is immaterial in the disposition of this case, for the reason that although the court below found that the Garfield contract of April 10th was received by plaintiffs after October 10th, yet it stands uncontradicted in the testimony that a letter purporting to contain a copy of the Garfield contract was sent by defendant to plaintiffs and the return receipt for such registered letter signed by the then bookkeeper of the plaintiffs at Janesville at about noon of April 10th. The bookkeeper whose signature appeared on such receipt was not called as a witness and the plaintiffs did not leave Janesville for the work until the evening of April 11th. That importance was attached to the plaintiffs having a copy of the Garfield contract is evidenced by article XII of the contract of April 2d, which required defendant to furnish such copy on or before April 10th.

We are satisfied that it must be considered as a verity in this case and any finding to the contrary deemed modified, that the plaintiffs did receive on April 10, 1908, and have in their possession from then on, the so-called Garfield contract of April 8th between the defendant and the government, and are chargeable with knowledge of its contents, and cannot be heard to say that they relied upon the language in these telegrams which might have led them to a different understanding as to the contents of such contract, and especially when they retained it without protest on the score of any in-

consistency between the face of the Garfield contract and any such understanding.

As to the item of $7,050, the so-called penalties withheld by the United States government from Orman & Crook under their contract, the following are verities in the case: That by the Garfield contract the United States government did promise and agree to pay to defendant the hold-backs of $45,000, but did not agree to pay these penalties; during the progress of the work, in the monthly statements from September, 1908, until June, 1911, and in the final estimate of December 21, 1911, there is no suggestion or intimation on the part of the government that it intended to change the position it had assumed under the Garfield contract with reference to these penalties; under such a situation the remission of such penalties would have been a favor on the part of the government to either the defendant or the plaintiffs and not a matter of contract right; the plaintiffs at no time prior to the final settlement between the government and the defendant under the Garfield contract directed, suggested, or demanded that the defendant should require such a favor from the government; the time within which the defendant could properly request such favor was before the acceptance of the final estimate of December 21, 1911.

Considering these verities in the light of the construction that we have adopted of the contract between the parties, we can see no ground upon which the plaintiffs' claim for these penalties can be allowed, and neither of the grounds upon which plaintiffs contend for a liability can be sustained; the first, namely, on the theory of an absolute liability of defendant, because we have determined that that was not the effect of the contract; or secondly, that the defendant, having made no effort to collect the same from the government, cannot be heard to say that it could not have collected them if such attempt had been made. This second contention is disposed of adversely to plaintiffs because, the matter of pen-

alties being one of favor and not of contract, it was as much incumbent upon the plaintiffs to ask for such favor after the Garfield contract was brought to their attention as it was on the part of the defendant, and the plaintiffs having permitted that opportunity to go by without such application on their part, either directly or through defendant, plaintiffs cannot now hold defendant on the speculative theory that such a favor might have been granted if some one had asked for it.

It is true that in the testimony of Mr. Griffin with reference to the conference had between representatives of the parties as to the bringing of the suit in the district court of Columbia he testified that he mentioned there that such suit was to determine the question of the penalties as well as the payment of the hold-backs, but there was subsequently sent to the plaintiffs a written statement as to the nature of the Washington suit in which the penalties are not mentioned, and furthermore they and their counsel are chargeable with knowledge that a claim of such a nature as would be one for these penalties would have to be brought in the court of claims and not in the district court of the District of Columbia, the former court alone having jurisdiction over amounts for which the government had denied liability, as would be the case for these penalties.

The item allowed by the trial court of $4,469.47 is designated the Young claim because it is the balance or net cost to the plaintiffs arising from a transaction between them and one Young, who asserted title to considerable of the property which had been used on the work by Orman & Crook and left there by them in January, 1908. The government took possession of all such property, including the horses, supplies, tools, and materials, by virtue of the provisions of the contract with Orman & Crook, and continued to use the same in the prosecuting of the work during the interval between January and April 21, 1908.

By the Garfield contract the government permitted the

defendant to have the possession and use of such property. By the contract between the parties hereto the defendant agreed in paragraph II that the plaintiffs should have the use of the plant, horses, mules, and materials of Orman & Crook taken into possession by the secretary as aforesaid, and provided that an inventory thereof might thereafter be annexed to the contract. The defendant also agreed that the contractors should have the use of said property without charge during the progress of said work, and that it would protect and defend the plaintiffs against a superior claim on the part of any other person affecting the possession of any of said property.

No inventory was ever attached to the contract, according to the above provision. One had been made on February 1st, but plaintiffs testify that they did not see that one. Another was made April 21st at the time the supplies and materials were turned over by the government officials to the plaintiffs. The plaintiffs testified as to this inventory that they would not accept it for the reason that all the property was not turned over to them. Defendant's testimony was that it knew nothing of this inventory until long after the work was completed. In this inventory there was a statement to the effect that certain equipment was claimed and probably owned by Mark Young and that it was not included in the preceding part of the inventory of the Orman & Crook property, but is turned over to plaintiffs by order of the director of the United States government service.

About June 1, 1908, the plaintiffs notified defendant that Young was now claiming the ownership of this property and insisting on its delivery to him or compensation for it, and they also asserted that to be deprived of the property at that stage of the work would seriously incommode its prosecution.

During the first stages of the controversy concerning this claim of Young's, plaintiffs notified defendant that there

was a serious doubt as to Young's ownership and that he was probably a partner instead of being an employee of Orman & Crook, and the government at first took the stand that it would through the United States district attorney defend against any claim of Young. Subsequently the government refused to take any part in the controversy, and plaintiffs notified defendant that they were satisfied from the proceedings that had been taken in Denver in the bankruptcy of Orman & Crook and the adjudication there made that Young, as a matter of fact, owned this property, and suggested to the defendant that it and the plaintiffs should join in purchasing the property from Young. Defendant then took the position and maintained the same thereafter that it was under no obligation towards the plaintiffs with reference to this claim of Young and that they must protect themselves, and refused to participate in any proposed purchase of the claim of Young.

Thereupon the plaintiffs purchased for about $7,000 this property of Young and continued to use the same on the work. Thereafter they sold certain portions thereof in such manner that the net cost to them became the amount that was allowed by the court of $4,469.47. This purchase from Young was finally closed on August 26, 1908, and it was from that date that the court allowed interest on this balance.

It is contended in opposition to the allowance of this item that from the language of the inventory of April 21st, made at the time the property was turned over to the plaintiffs, they were bound to know from the recital that this was not the property of Orman & Crook, but was claimed by and probably owned by Mark Young, and that therefore, when they accepted the same with such notice, they could not charge the defendant with any liability on account thereof; or again, that the contract must be construed as guaranteeing to plaintiffs possession and use of and freedom from su-

perior claims only as to property actually owned by Orman & Crook and did not apply to or cover property which, although it might have been in the possession of the government and turned over to the plaintiffs, as a matter of fact was not owned by Orman & Crook; or lastly, that, plaintiffs having failed to give defendant an opportunity to defend by litigation against the claim of Young to this property and having settled with Young themselves without such litigation, the defendant cannot be held.

We are satisfied from a consideration of the testimony that none of these objections is tenable and that the findings of fact of the trial court upon which the allowance of this item is based are supported and should stand. The contract, it is true, is somewhat indefinite as to whether or not it was intended to cover property simply owned by Orman & Crook or property that was in the possession of and used by Orman & Crook in the carrying on of the work. Whatever doubt might have been in the language of the contract, it was proper for the court to solve it by the aid of the evidence presented at the trial, and there is sufficient support in that evidence to warrant the court in coming to the solution that it did.

There is no question but that this property was actually on the work and had been used by Orman & Crook and, after their departure, by the government in the actual prosecution of the work. It was necessary for such work and might well be held to have been within the letter and the spirit of the contract.

The defendant in effect elected to stand upon its own construction of the contract and deny responsibility in any manner for this Young controversy. Having so elected, it is bound by such election, and could not in the face of that stand require the plaintiffs to go through the useless formality of tendering to defendant the defense of any lawsuit between plaintiffs and Young.

The first statement or estimate appearing in the record from the United States government for the doing of the work after the plaintiffs commenced in April, 1908, was dated September 30th. On such statement or estimate was an item of deduction from the amount to be paid for such work of $4,594.87 under the designation "Supplies and materials purchased by U. S. and turned over to *National Surety Company.*" Subsequently it identifies it as estimate No. 5, which is in the nature of a bill October 1, 1908, for materials and supplies purchased by the United States upon suspension of Orman & Crook contract, for use in connection with the work covered by said contract and turned over to the *National Surety Company* on April 21, 1908. Of this bill about $246.21 was for lumber, harness, hardware, and other materials, and the balance of $4,348.68 was for hay, ice, coal, potatoes, and other food supplies. It was found by the court below, and there is evidence to support it, that the United States from time to time consumed part of the materials and supplies on hand when they took the plant over in January, 1908, and it even supplied other materials and supplies, and that all such were used in connection with and as a part of the plant and were upon the work when the contract between the parties was made, and that both parties assumed that such supplies and materials were a part of such plant; that the amount of such item was deducted by the government under the Garfield contract; that such deduction was never consented to by plaintiffs, and that such claim of the United States was and is a superior claim against the property turned over to the plaintiffs by the government such as is mentioned in paragraph II of the contract.

Defendant's objections to the allowance of this claim are substantially, first, that it was not covered by the contract between the parties and is not a claim or lien against the property; and secondly, that if it should be such a lien, the

deduction was acquiesced in without objection by the plaintiffs and that they therefore must be held to have waived, as against the defendant, any claim for such item. It was as much due to the failure of the defendant as of the plaintiffs to see to it, that the proper inventory as to the property intended to be covered under defendant's guaranty of quiet possession in the contract was not made and attached to the contract, for such an inventory might easily have solved all doubtful questions which have arisen on this subject. In default of such inventory the court below must necessarily have resort to evidence to determine from all the surrounding circumstances and the situation of the parties what was intended to be covered by the contract. From such consideration the court arrived at the conclusion that this property, as well as that claimed by Young, was intended to be made secure in the possession of the plaintiffs for the prosecution of the work, and we cannot disturb such findings.

While there is much force in the contention of the appellant that the plaintiffs waived their claim as to this matter by the acquiescence of the plaintiffs in the deduction during the time the government was sending in monthly estimates from September, 1908, until June, 1911, and in the final estimate of December 21, 1911, yet it does not necessarily follow that, as a matter of law, such tacit acquiescence in the deduction so far as the government was concerned in its dealings under the Garfield contract, to which, of course, the plaintiffs were not parties, amounted to a waiver of their claim as against the defendant under their separate contract. Manifestly a final adjustment of affairs between the plaintiffs and the defendant could not be expected to be determined until at least the adjustment with the government under the Garfield contract had been disposed of, and before that was done by the defendant this present action had been commenced.

There is a further subs[illegible]l to support the find-

ings and conclusion of the trial court as to both of these preceding items, namely, the so-called Young claim and the government deduction. That is founded upon the unqualified admission of a liability as to both of these items, although not as to the full amount thereof, that was made by the vice-president and counsel, Mr. Griffin, in February, 1914, and during the progress of the trial of this action.

A conference was had in Chicago with reference to the situation then present, arising under the contention of the government that the hold-backs should be paid to the trustee in bankruptcy for Orman & Crook and not to the defendant. At that time the situation as to these two other items was discussed, and in consideration of an extension of time for the trial of the present lawsuit, then pending, it was agreed that an investigation should be made into the plaintiffs' claims for this Young item and the government deduction item, and information was furnished by plaintiffs to defendant for such examination. A further extension of time was requested for the investigation of these claims and such extension granted, and thereafter the vice-president of defendant caused checks to be drawn, one for $3,763.04 on the Young claim, and another for $246.21 on the government deduction item, and sent the same to defendant's counsel at Milwaukee, notifying plaintiffs' counsel, by two communications, that the defendant was satisfied that there was a liability of the defendant for these two items and to the amount evidenced by these two checks. After these checks reached Milwaukee defendant's counsel there took a different view of the situation and advised the defendant that a liability for the same did not exist, and for that reason the checks were never delivered.

Such admission of liability, after full opportunity for examination and consideration, is of great weight and would be amply sufficient to support these findings of the court.

[illegible]mitted the obligation as to each of these items,

the defendant cannot limit it to the exact amount which it conceded it was willing to pay on those two items.

It is urged by defendant that under the contract nothing was due or payable until the engineer's certificate had been obtained by the plaintiffs and presented to or filed with the United States government, but from the view we have taken of the rights and liabilities of the parties to this contract we do not consider that such is a material question in the case. Such certificate was only necessary as between the government and the defendant under the Garfield contract, and the duty to obtain it rested primarily upon the defendant. Such a provision was to protect the United States government and not the defendant, and although the plaintiffs were to stand in the shoes of Orman & Crook under the original contract, yet plaintiffs' obligations under that contract would be to the government and not to defendant. The defendant, especially where it has continually repudiated any obligation to be an active agent in securing the money from the government, is in no position, under the contract of April 2d, to insist on any such condition being performed on the part of plaintiffs.

Again, the defendant urges that, since it appeared that after the work was completed certain claims were made against the plaintiffs for alleged balances due to subcontractors or others employed on the work, therefore until such claims had been satisfied and discharged plaintiffs could not maintain this action. Reliance for such position is placed upon the provision in article I of the contract of April 2d by which plaintiffs agreed to pay for all materials, labor, and supplies furnished, used, or necessary in said work, and to discharge any attachments or liens that might be filed by any person furnishing such materials, labor, and supplies. The answer to this contention is that such action on the part of plaintiffs is not expressly made a condition precedent to its receiving the money from the government, nor is it one by implication; the defendant had ample security by withholding funds sufficient to cover such claims, or requiring such

claimants to be made parties hereto. And lastly, as found by the trial court in its fourteenth finding, the defendant never based its refusal to act upon either the failure of plaintiffs to obtain such releases or the engineer's certificate.

The estimate of December 21, 1911, or so-called final estimate, was not forwarded by defendant to plaintiffs until July 19, 1913, and it was then returned by them to the defendant, which on October 24th sent the final estimate, with the necessary release executed by it, to the government officials having charge of the work and accounts in this matter. The comptroller of the treasury rendered an opinion November 11, 1913, in substance advising that the payments of the hold-backs could not safely be made to any other than the trustee in bankruptcy of the firm of Orman & Crook, and suggesting the advisability of some suit being instituted to determine to whom such fund could safely be paid. Thereupon the defendant was notified that unless steps were taken requiring some other disposition thereof, the government would, in February, 1914, pay such hold-backs to such trustee in bankruptcy of Orman & Crook. Thereupon, after consultation with plaintiffs and their counsel, defendant instituted a suit in its own name in the district court of the District of Columbia making the proper government officials parties thereto as well as the trustee in bankruptcy. During the pendency of such action the government paid the item of $24,860.08 which was paid over to plaintiffs on August 28, 1914. An adverse decision was made on the hearing of said action in the district court as to the other item of hold-backs and an appeal taken by defendant, and on the appeal a final judgment rendered determining that the payment of the hold-backs could properly be made, as provided in the Garfield contract, to defendant, and, such judgment being complied with by the government, the amount so received was turned over to defendant and held by it to be disposed of subject to the decision of the court on the plea in abatement.

In the prosecution of such lawsuit the defendant incurred

expenses amounting to about $3,400 and claims that it should be allowed such sum as in the nature of a counterclaim against the plaintiffs, again relying in support of such claim upon the position it had planted itself upon with reference to the contract, namely, that any steps that defendant took to obtain this money from the government to be paid over to the plaintiffs were in the nature of a favor and not an obligation, and that, having brought this suit and obtained the money, it should be reimbursed its expenses.

Under the view of the contract that we have deemed it right to take, the bringing of this lawsuit in order to obtain the money from the government was one of the implied obligations that the defendant assumed towards the plaintiffs, and it was merely doing what it ought to do under its contract of April 2d, and the trial court was therefore correct in disallowing this amount.

The contract of April 2, 1908, was made by defendant on one side and by Hayes Brothers Company, a Janesville corporation, and John W. Peters, on the other. The corporation filed a certificate of dissolution in February, 1913, with the secretary of state, and no question is raised but that such certificate was regular, sufficient under the statute, and properly filed. By sec. 1764, Stats., it is provided that after such dissolution such corporation shall nevertheless continue to be a body corporate for three years thereafter for the purpose of prosecuting and defending actions and enabling it to settle and close up its business, dispose of and convey its property, and divide its capital stock, and for no other purpose.

After the three-year period expired John W. Peters died, and the present plaintiff, *Mary Kathryn Peters,* was appointed administratrix of his estate and substituted in his stead as a party plaintiff.

The defendant now suggests as a difficulty, without offering any solution or remedy for such, first, that a partnership

cannot be formed between a corporation and an individual, and that therefore there was no such joint interest in this contract that upon the dissolution of the corporation it became the property of the individual who survived; and second, that there is no one to whom in safety to itself it can pay the amount due for the completion of the work, which it concedes it still holds, belonging to some one else than itself.

The defendant, however, elected to enter into this contract with the two entities, the corporation and an individual, and is not in a position now to contend that such a contract could not be properly made. The corporation by its own hand in February, 1913, died, and by virtue of the statute above quoted became dead beyond all probability, if not all possibility, of resurrection in February, 1916. Whatever rights it may have had in and to this fund, not having been disposed of by any action on its part at the time of such death, necessarily passed to someone or somewhere, but certainly did not revert to the defendant. No other resting place is suggested for this fund by the parties and none occurs to us other than the person also interested in the contract who survived, namely, Mr. Peters, and we hold, therefore, that under the record in this case whatever interest and ownership there was in the funds here in question passed on the death of the corporation, as it would have on the death of an individual copartner, to the surviving partner, so far at least as the defendant in this action is concerned, and that the present plaintiff, the administratrix of the estate of Peters, is the proper person to whom payment may be made, and the plea in abatement was properly overruled.

Interest was allowed by the court below on the various items of damages for which judgment was directed. From December 21, 1911, on the hold-backs of $44,768.22 to the date of the entry of judgment, and on the item of $24,860.08, the amount for the final work, to August 28, 1914, the date when such sum was paid over to plaintiffs.

As to these two items we think that that date is fixed at least thirty days too early, because under the contract as we have construed it the defendant's obligation was to take the necessary steps to collect the amounts due under the Garfield contract from the government and pay them to the plaintiffs, yet that would necessarily involve a reasonable time for the government officials to check over and approve of any such final estimate.

It appears that about thirty days was the time taken, from October 24, 1913, to November 22, 1913, after the final release was signed by the defendant and returned to the government, before the government took action warranting the disbursement of these amounts; that would seem to be a reasonable time, and the obligation to pay would therefore not rest upon defendant until after such time had passed and would bring the period for the running of the interest as to these two items embraced in the final estimate of December 21, 1911, up to January 21, 1912, and the judgment should be modified accordingly.

We do not overlook the fact that by the fifteenth finding the trial court found that the time between July 1 and December 21, 1911, was a reasonable time within which the defendant could and should have taken the necessary steps to collect from the government the amounts due for this work. There is no evidence, however, that any of the delay between the preceding government estimate of June, 1911, and the final estimate of December 21, 1911, was due to any delinquency on the part of the defendant or that such interval was unreasonable in view of the nature of the work and all the other circumstances, or that such was not the regular routine for such accounts to take. It was a very large project, costing over a million dollars, and some time must necessarily elapse between the time of the actual completion of such work and the time when the government could safely say that it was ready to make its final estimate. In the ab-

sence of showing to the contrary, it is presumed that the final estimate was made by the government with reasonable dispatch. The filing, therefore, of this final estimate on December 21, 1911, as a public record, so to speak, was the date at which defendant's activities should begin, and, as we have just seen, thirty days from that date a reasonable time from which its liability as to interest should begin.

The allowance of interest on the Young claim from August 26, 1908, is proper and will not be changed.

The question of interest on the government deduction of $4,594.87, which item first appears in the government estimate of September 30, 1908, brings up the oft discussed questions of when interest should be allowed in contract actions, and, when allowed, from what time. The confusion that has often arisen on such subject is fully shown in the discussion on the subject in the case of *Laycock v. Parker,* 103 Wis. 161, 178, 189, 79 N. W. 327.

In some cases for breach of contract and some sounding in tort a sum is allowed equivalent in amount to interest, not as interest, but simply as compensation for the delay, in order that the plaintiff may be fully remunerated. *J. I. Case P. Works v. Niles & Scott Co.* 107 Wis. 9, 17, 82 N. W. 568.

Such a rule has been especially recognized in actions for injury to property. *Voigt v. Milwaukee Co.* 158 Wis. 666, 149 N. W. 392; *Bagnall v. Milwaukee,* 156 Wis. 642, 649, 146 N. W. 791.

But in many actions for breach of contract, where the contract itself does not expressly provide for interest, a demand for payment may be necessary in order to fix the period from which interest is ultimately to be computed. And in the absence of other form of demand the commencement of the action is treated as such demand. *Laycock v. Parker,* 103 Wis. 161, 188, 79 N. W. 327. Or, as is stated in the case of *State v. Milwaukee,* 158 Wis. 564, 573, 149 N. W. 579,

where no time of payment is fixed in the contract, or where the claim is unliquidated, or where the question of liability is so involved in doubt that there are reasonable grounds for believing that no liability exists, a demand is, in the absence of peculiar equitable considerations, necessary to set interest running.

It is alleged in the complaint that demands were made before the commencement of the action for these various items, and issue was raised on this allegation by the general denial in the answer. We find no evidence in the record of anything in the nature of a demand for this particular item having been made prior to the commencement of this action. In the eleventh finding of fact, which concerns this item, it is declared that this deduction was made without the consent of plaintiffs; that they have not been paid, and that it was a superior claim; but no finding is made as to any demand for such sum by plaintiffs on defendant. It was deducted September, 1908, at the time the government made its first estimate under the Garfield contract, and appeared as a deduction through all succeeding monthly estimates as well as in the final estimate of December 21, 1911. The amounts were received by the defendant and turned over to the plaintiffs without any exception being taken by plaintiffs at the respective times as to this item.

The language of the item, namely, "Supplies and material purchased by U. S. and turned over to *National Surety Company,*" did not necessarily, as a matter of law, notify the defendant that such deduction was a superior claim against the property turned over to plaintiffs for which it must be responsible under the second clause of the contract, or that it must forthwith pay such sum to the plaintiffs in order to avoid liability. Under the nature of the transaction between the parties, it may well be said that the situation here is governed by the rule laid down in *Ryan D. Co. v. Hvambsahl,* 92 Wis. 62, 65 N. W. 873. In the absence of a prior

demand, therefore, the commencement of this action December 3, 1913, must be considered the date from which interest on this item shall be computed.

In thus disposing of all the questions before us that are deemed material, it follows that the judgment below must be modified so that it shall provide for damages as of the date of the entry of judgment July 10, 1917, as follows:

	Principal.	Interest.
Young claim	$4,469 47	
Interest on this item as specified in findings $1,447.91, plus interest on $4,469.47 August 25, 1912, to judgment, of $1,307.35; total on this		$2,755 26
Government deduction	4,594 87	
Interest from December 3, 1913, to July 10, 1917		993 18
Interest on $24,860.08 from January 21, 1912, to date of payment, August 28, 1914		3,882 28
Hold-backs	44,768 22	
Interest thereon from January 21, 1912, to July 10, 1917		14,684 70
Totals	$53,832 56	$22,315 42
Total principal		$53,832 56
Total interest		22,315 42
Total		$76,147 98
Costs in circuit court		114 28
Grand total		$76,262 26

—instead of the sum of $87,473.45 as therein entered.

By the Court.—The judgment of the circuit court is modified to provide for the allowance of $53,832.56 as principal, $22,315.42 as interest, and $114.28 costs and disbursements, making a total of $76,262.26, and as so modified it is affirmed as of July 10, 1917; appellant to have its costs and disbursements in this court.

A motion for a rehearing was denied, with $25 costs, on April 3, 1918.

The following opinion was filed May 2, 1918:

ESCHWEILER, J. (*dissenting*). I must dissent from the order denying the motion for a rehearing because a re-exam-

ination of the record herein convinces me, as I now freely, though perhaps not cheerfully, admit that it was improper to allow interest, as was done in the decision, amounting to $7,619.36 on two separate items involved in the lawsuit in Washington, D. C., and for periods of time between February 28, 1914, when that action was started, and August 28, 1914, and October 6, 1916, respectively.

At the time of the making of the so-called Garfield contract in April, 1908, between defendant and the government the question was raised by the reclamation bureau as to whether, under the situation then existing, sums then withheld under the contract with Orman & Crook could ultimately be properly paid to the defendant as against the trustee in bankruptcy of those original contractors. At that time the question was examined and passed upon by an assistant attorney general of the United States whose finding was approved by the secretary of the interior, to the effect that such payments might be properly made to the defendant as against the trustee in bankruptcy.

In November, 1913, the comptroller of the treasury rendered a decision holding just the opposite to the position taken in 1908. This change necessitated the bringing of a lawsuit in Washington in which the trustee in bankruptcy was made a party in order to determine that very question. As a result of this lawsuit, which, it is conceded, was prosecuted with due diligence, the original position of the government in 1908 was upheld and the later position under which payment was delayed declared untenable.

Interest is allowed in this case by way of damages only. Under such a situation I think the period during which the question was necessarily litigated in Washington owing to this changed position of the government was a period during which interest on the sums there involved could not be properly charged against the defendant. It neither had the use of the money nor did it receive interest from the govern-

ment for such delay. *Burr v. Comm.* 212 Mass. 534, 537, 99 N. E. 328; 22 Cyc. 1558; 15 Ruling Case Law, 34; *Rennell v. Kimball,* 87 Mass. 356, 367; *McDonald v. Loewen,* 145 Mo. App. 49, 130 S. W. 52.

Again, I think it cannot be properly held that such a radical change of position by the government as to such payment was within the field of reasonable contemplation of the parties to this litigation at the time the contract between them was made. For a breach of contract such damages only are allowable as are within the field of reasonable contemplation. *Lommen v. Danaher,* 165 Wis. 15, 19, 161 N. W. 15; *Lloyd Inv. Co. v. Ill. S. Co.* 164 Wis. 282, 289, 160 N. W. 58; *Nelson v. Goddard & Co.* 162 Wis. 66, 71, 155 N. W. 943.

KERWIN, J., concurs in the foregoing dissent.

OWEN, J., took no part.

BUILDERS LUMBER & SUPPLY COMPANY, Respondent, vs. CHICAGO BONDING & SURETY COMPANY, Appellant.

January 9—April 3, 1918.

Contractor's bond: Municipal work: Rights of materialmen and laborers: Suretyship: Construction of contract: Instruments construed together: "Express" agreement: "Subcontractor:" Waiver of rights.

1. Where a contractor's bond expressly obligates the signers thereof to pay for the material and labor entering into the construction called for by the contract, materialmen and laborers may maintain an action against the sureties.
2. The doctrine that contracts of suretyship are to be strictly construed and the liability of the sureties is not to be extended by implication or presumption, does not mean, even as to ordinary sureties, that such contracts are not to be reasonably interpreted as other contracts are.
3. A contractor's bond given by a surety company for a money con-

sideration has all the essential features of an insurance contract and is not to be construed according to the rules applicable to ordinary accommodation sureties.

4. Where the bond of a contractor for municipal work is conditioned that he shall "fully and faithfully perform all the conditions and covenants contained in the contract," and in the contract he covenants to "pay in full for all labor employed and materials used," the two instruments must be construed together and the surety is thereby as "expressly" bound to pay for labor and materials as if this were stated in the bond itself.
5. The fact that one who merely furnishes materials to a contractor does so under a written contract does not affect his status as a materialman or make him a "subcontractor" in such a sense that he is not within the protection of a surety bond which secures payment for materials.
6. A materialman did not waive his rights under such a bond by continuing to furnish materials after the contractor's default in making certain payments when due, there having been no modification of contract, extension of time, or other agreement, act, or omission which released the surety.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

On the 30th day of March, 1916, Thomas Cerney and Charles Frey, copartners, residents of the state of Illinois and doing business under the firm name of Conducive Paving Company, entered into a contract with the city of Wausau for the construction and laying of a certain paving in that city, and to assure the faithful performance of that contract said Conducive Paving Company made and executed to the said city of Wausau a bond with the defendant *Chicago Bonding & Surety Company* as surety.

Pursuant to a contract made with the said Conducive Paving Company on the 16th day of February, 1916, the plaintiff herein, *Builders Lumber & Supply Company,* during the months of August and September, 1916, sold and delivered to said Conducive Paving Company certain materials consisting of lumber, cement, and brick for use in the performance of its said contract with said city, which said materials were so used.

This action is brought by the said *Builders Lumber & Supply Company* against the *Chicago Bonding & Surety Company* to recover an unpaid balance due to it from said Conducive Paving Company on account of such material so furnished and delivered. The defendant interposed a demurrer to the complaint, which demurrer was overruled. The defendant then answered, and upon a trial of the case judgment was rendered in favor of the plaintiff. From this judgment defendant appealed. Such portions of the contract and bond as are pertinent to the liability of the *Surety Company* in this action are sufficiently referred to in the opinion.

William L. Tibbs, attorney, and *Daniel W. Sullivan,* of counsel, both of Milwaukee, for the appellant.

For the respondent there was a brief by *Kreutzer, Bird, Okoneski & Puchner* of Wausau, and oral argument by *C. B. Bird.*

The following opinion was filed February 5, 1918:

OWEN, J. It is the main contention of appellant that by signing the bond in question it assumed no liability in behalf of laborers or materialmen, and the questions now presented are practically the same as those raised by the demurrer to the complaint, the principal one being whether appellant in signing the bond became obligated to laborers and materialmen for work and material performed and furnished by them.

It is well settled in this jurisdiction that where a contractor's bond expressly obligates the signers thereof to pay for the material and labor entering into the construction called for by the principal contract, those furnishing material for, or bestowing labor upon, such construction may maintain an action therefor against the sureties on the bond. *United States G. Co. v. Gleason,* 135 Wis. 539, 544, 116 N. W. 238; *R. Connor Co. v. Ætna I. Co.* 136 Wis. 13, 18,

115 N. W. 811; *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 10, 138 N. W. 102; *Concrete S. Co. v. Ill. S. Co.* 163 Wis. 41, 44, 157 N. W. 543.

Appellant insists that, in determining the question whether or not the bond contains a covenant for the benefit of parties other than the city of Wausau, all reasonable doubts which may arise on a reading of the bond must be resolved in favor of the surety and against the claim of increased liability; that sureties are favorites in the law, and a contract of suretyship must be strictly construed to impose upon the surety only those burdens clearly within its terms and must not be extended by implication or presumption. We recognize this rule as applied to ordinary sureties, but even as to this rule so applied it has been said:

"While it is true that a surety cannot be held beyond the express terms of his contract, yet, in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Such construction does not mean that words are to be distorted out of their natural meaning, or that, by implication, something can be read into the contract that it will not reasonably bear; but it means that the contract shall be fairly construed, with a view to effect the object for which it was given, and to accomplish the purpose for which it was designed. The old rule of *strictissimi juris* applies only to the extent that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that the contract shall not be reasonably interpreted as other contracts are." *Sather B. Co. v. Arthur R. Briggs Co.* 138 Cal. 724, 72 Pac. 352.

It has also been held by this and other courts that a bond of the kind involved in this case, given for a money consideration, has all the essential features of an insurance contract, and that it is not to be construed according to the rules of law applicable to the ordinary accommodation surety. *First Nat. Bank v. United States F. & G. Co.* 150 Wis. 601, 137 N. W. 742, and cases there cited.

By the terms of the bond in question appellant acknowledges itself bound to the city of Wausau in the sum of $20,000, the condition thereof being stated as follows:

"Whereas, the above bounden Conducive Paving Company has made to the city of Wausau a proposal in writing to furnish all the material and do all the work necessary to paving Grand and Forest avenues in said city, in accordance with the plan, profile, details, and specifications on file in the office of the city clerk of said city:

"Now, therefore, the condition of this obligation is such, that if the above bounden Conducive Paving Company, the said contract being awarded to them, shall fully and faithfully perform all the conditions and covenants contained in the contract as well as the provisions contained therein or other guaranty of such work, and shall refund to said city of Wausau all sums which it may be obliged or adjudged to pay on any claim or demand for damages as provided in said contract, then this bond to be void, otherwise in full force and effect."

Note the provision *"that if the above bounden Conducive Paving Company . . . shall fully and faithfully perform all the conditions and covenants contained in the contract,"* etc., "then this bond to be void, otherwise in full force and effect." The bond is to be void if, and only if, the Conducive Paving Company "shall fully and faithfully perform all the conditions and covenants contained in the contract." What are those conditions and covenants? They are not recited in the bond. We cannot ascertain the scope, extent, or nature thereof by confining ourselves to an inspection of that document. Obviously we must turn to the contract to find the extent and nature of appellant's obligations. In other words, the contract and bond must be construed together.

Turning now to the contract between the city and the Conducive Paving Company, we find not only the usual provision that "the contractor hereby agrees to and with said city to furnish all the material and do all the work necessary to complete said pavement," but in a remote part of the con-

tract, as a distinct and special agreement, occurs the following:

"And the said contractor hereby guarantees, covenants, and agrees to and with the said city of Wausau, that he will well and truly execute and perform this contract on his part, under the superintendence and to the satisfaction of the said board of public works, *and will pay in full for all labor employed and material used in the performance of this contract,* and that said contractor further covenants and agrees to protect and hold said city harmless against all actions and claims or demands for damages of any kind or character whatsoever, which may arise from carelessness, neglect, or otherwise, or which may accrue under the Workingman's Compensation Act of the state of Wisconsin, in the prosecution of said work."

If that was not deliberately intended for the benefit of third parties—for the benefit of materialmen and laborers—why was it inserted? It was already provided that the contractor should furnish the material and labor for the construction of the work. It was not necessary for the avoidance of mechanics' liens, because the property of a municipality is not subject thereto. It was not necessary to make the contractor personally liable to laborers and materialmen, because that liability would arise from the contracts of employment of laborers and purchase of materials. We cannot assume that this provision was introduced into the contract for its resounding effect or for an idle purpose. It is highly commendable on the part of municipalities to secure protection for those who render services and furnish materials in and about the construction of their public works. Indeed it is good business policy for them to do so.

"Such agreements are declared to be promotive of a just protection to such third persons and as operating to protect municipalities by securing more responsible dealers and better materials and as tending to promote justice and equity between all the parties contributing to the erection of such buildings." *United States G. Co. v. Gleason,* 135 Wis. 539, 545, 116 N. W. 238.

It has been said that there is a moral obligation on the part of a municipality to see that the material and labor entering into the construction of the work which is the subject of the contract is paid for, and that this moral obligation is a sufficient consideration to support a contract for the benefit of third parties. *Knight & Jillson Co. v. Castle,* 172 Ind. 97, 87 N. E. 976. We see no reason to doubt that the provision in question was inserted in the contract for the purpose and with the intent on the part of both parties of securing protection to laborers and materialmen dealing with the contractor. This protection could be secured only through the bond required by the city to assure faithful performance of the contract. The bond was signed by the surety with full knowledge of this intent and purpose—at least it cannot be heard to claim otherwise. By its terms it does assure the full and faithful performance of each and every agreement of the contract. If this is not the import of the language of the bond, we are at a loss to know what covenants are not included within its protection. If the covenant that the contractor will pay in full for all labor employed and material used in the performance of the contract is not within the protection of the bond, how are we to determine the particular covenants of the contract that do fall within its protection?

Counsel for appellant seem to be of the opinion that in order to constitute liability on the part of the surety for claims due third parties there must be a specific and express provision to that effect written into the bond itself, and in support of that position they cite us to cases which hold that an agreement made between two persons for the benefit of a third, to be enforceable by such third person, must be express. The word "express" in such connection is used, of course, in contradistinction to "implied." As said in *Arnold v. Randall,* 121 Wis. 462, 465, 98 N. W. 239, such an agreement "could not arise from any mere implication or legal imputation." It happens, also, that in the cases

above cited where the surety was held liable at the suit of laborers and materialmen there was a specific reference thereto in the bond itself. But neither the principle that such an agreement must be express, nor the circumstance that in the cases decided by this court holding the surety liable to third parties such a provision occurred in the bond itself, nor both together, can operate to exempt appellant from liability here. The contract and bond, construed together, expressly bind the appellant *Surety Company* to pay for the material and labor entering into the construction of the paving called for by the contract between the city and the paving company as efficiently and potently as though it were specifically stipulated in the bond. Resort to implication or inference is unnecessary. Such is the plain meaning of the language employed. Similar contracts and bonds frequently have received like construction. *Knight & Jillson Co. v. Castle,* 172 Ind. 97, 87 N. E. 976; *Jordan v. Kavanaugh,* 63 Iowa, 152, 18 N. W. 851; *Wells v. Kavanaugh,* 70 Iowa, 519, 30 N. W. 871; *Lyman v. Lincoln,* 38 Neb. 794, 57 N. W. 531; *Sample v. Hale,* 34 Neb. 220, 51 N. W. 837; *Fitzgerald v. McClay,* 47 Neb. 816, 66 N. W. 828; *W. P. Fuller & Co. v. Alturas School Dist.* 28 Cal. App. 609, 153 Pac. 743; *Sailling v. Morrell,* 97 Neb. 454, 150 N. W. 195.

The conclusion reached brings the case squarely within the doctrine of those cases first cited, wherein the sureties were held bound to materialmen and laborers, and disposes of appellant's principal contentions.

Appellant suggests that plaintiff was a subcontractor and not a materialman and, therefore, was not within the protection of the bond. The only thing plaintiff did was to furnish the contractor with certain materials entering into the construction of the paving. It is clearly one of those protected by the bond. The fact that the materials were furnished pursuant to written contract does not affect its

status as a materialman nor convert it into what is generally understood by the term "subcontractor." We do not mean to imply, however, that it would necessarily be without the protection of the bond even though it were a subcontractor.

Appellant makes the further claim that plaintiff waived its rights under the bond by continuing to furnish material to the contractor after the latter had defaulted in making certain payments when due. Upon this point the trial court found:

"There has been no delay, modification of contract, extension of time, or other agreement or act, or omission, which has released the obligation of said bond or the right of the plaintiff to recover thereon for the unpaid balance due it for the goods so used in the performance of the contract mentioned, nor has there been any act which in any manner estops this plaintiff from bringing and maintaining this action."

We fully approve of this finding of the trial court.

By the Court.—Judgment affirmed.

ESCHWEILER, J., dissents.

ROSENBERRY, J., took no part.

A motion for a rehearing was denied, with $25 costs, on April 3, 1918.

MARLATT, Respondent, vs. WESTERN UNION TELEGRAPH COMPANY, Appellant.

February 6—April 3, 1918.

Telegraphs: Divulging contents of news message: Property interest of sender: Damages: Mental anguish: Punitory damages: Ratification of agent's act: Questions for jury: Assessment of punitory damages discretionary.

1. A newspaper reporter who, having a contract to furnish certain news to one paper exclusively, delivered the message to the telegraph company selected by that paper for its transmission, thereby parted with his property interest in such news, and cannot recover its value as an element of compensatory damages in an action against the company for divulging to other newspapers the contents of the message.
2. Nor can there be any recovery in such action for plaintiff's mental anguish or worry over the situation, whether the action be for breach of contract or in tort. Sub. 5, sec. 1778, Stats. 1915, fixing a maximum penalty for negligence of telegraph companies in receiving, copying, transmitting, or delivering messages is not applicable.
3. A telegraph company is not liable in punitory damages for the unauthorized and wilful act of its agent in divulging the contents of a message unless it ratified such act.
4. The question whether or not there has been a ratification of an agent's wilful act is generally for the jury; but the evidence may be so clear and uncontradicted that the court may decide the question as one of law.
5. A party is never entitled to have punitory damages assessed; their assessment, when the proper facts are shown, being in each case a matter within the sound discretion of the jury.
6. Where a telegraph company denounced the act of its agent in divulging the contents of a message and offered to discharge him, but was requested by plaintiff not to do so, and did not, it cannot be said to have ratified his act so as to be liable in punitory damages.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

Plaintiff, who was a newspaper reporter, had a contract to furnish exclusively to the Milwaukee Free Press the scores

of the state bowling tournament held at Kenosha, and filed with the agent of the defendant at that place messages containing such scores for transmission to Milwaukee to the Free Press. Defendant's agent, before sending the messages to the Free Press at Milwaukee, copied the scores and sent them by telegraph to the Milwaukee Journal, which paper published them at the same time they were published by the Free Press. Plaintiff sues for damages because he claims defendant's wrongful act of sending copies of the scores to the Milwaukee Journal resulted in an injury to his prestige and reputation as a newspaper reporter and as an honorable man, and in a diminution of his earning power as such reporter.

The jury by a special verdict assessed plaintiff's compensatory damages at $250 and his punitory damages at $3,000. From a judgment entered thereon in plaintiff's favor defendant appealed.

For the appellant there was a brief by *Bottum, Bottum, Hudnall & Lecher,* attorneys, and *R. N. Van Doren,* of counsel, all of Milwaukee, and oral argument by *Mr. Van Doren* and *Mr. George B. Hudnall.*

Geo. W. Taylor of Kenosha, for the respondent.

VINJE, J. Upon the question of compensatory damages the court instructed the jury that the elements thereof in this case were "the reasonable value of the information contained in the messages so wrongfully divulged by the defendant, which, according to the uncontradicted evidence, is $45, and such mental suffering as you are satisfied by the credible evidence was endured by the plaintiff, if any, because of anticipation of loss of business, and loss of prestige or standing as a newspaper correspondent, which you are satisfied might reasonably be apprehended under such circumstances as are shown in this case as the natural and proximate consequence of the defendant's wrongful act." The court correctly held

that there were no other elements of compensatory damages, for there was no evidence that plaintiff suffered any financial loss not included in the above elements. He was unable to show the loss of a single contract or engagement, present or prospective, by reason of defendant's wrongful act other than the value of the messages divulged and his worry or mental anguish over the situation. So the question recurs whether the elements submitted were proper. Plaintiff alleges in his complaint and reiterates again and again in his evidence that his contract with the Free Press was an exclusive one; that he told Miller, the defendant's agent at Kenosha, that he could not furnish him the scores because his exclusive contract with the Free Press prevented him from letting any one else have them. It is therefore evident that when he delivered the scores to the defendant, the agent selected by the Free Press for transmitting them to it, he surrendered control and possession of the property sold, and he no longer retained any property interest therein. Such property interest was in the Free Press, and any divulgence of the contents of the messages was a violation of the property rights of it and not of the plaintiff. This eliminates the value of the messages sent as an element of compensatory damages.

Is plaintiff entitled to recover for mental anguish or worry over the situation? If the action be considered one for a breach of contract then he cannot recover. *Walsh v. C., M. & St. P. R. Co.* 42 Wis. 23; *Koerber v. Patek,* 123 Wis. 453, 102 N. W. 40; *Frechette v. Ravn,* 145 Wis. 589, 130 N. W. 453. If it be considered one in tort, then, independent of the statute, he cannot recover. *Summerfield v. Western Union Tel. Co.* 87 Wis. 1, 57 N. W. 973. For a collection of authorities on both sides of this question see opinions in *Western Union Tel. Co. v. Ferguson,* 157 Ind. 64, 60 N. E. 674, 54 L. R. A. 846 and note, and valuable notes in 49 L. R. A. N. S. 206–344. The refusal of courts to allow damages for mental anguish alone is based on the ground that such damages are too speculative, vague, and subjective for assess-

ment by a jury, and that the incentive to capitalize grief would be so great that more injustice than justice would result from the adoption of a rule allowing such damages. The only rational remedy is a recovery under statutory provisions fixing a maximum penalty, as sub. 5, sec. 1778, Stats. 1915, does for a failure or negligence of telegraph companies in receiving, copying, transmitting, or delivering messages. That statute, however, does not reach this case, as the default of the defendant was outside the scope of its terms. The conclusion reached is that under the evidence plaintiff's compensatory damages were nominal only. Defendant asked that the court fix them at one dollar. This should have been done.

While defendant's agent Mohr, at Milwaukee, directed Miller, its agent at Kenosha, to secure the scores for the Journal, it is admitted that there was no intention on Mohr's part that they should be secured in other than a lawful manner, and that Mohr did not know until some time afterwards how they were secured. Defendant, therefore, even if Mohr could be considered as having authority to do so, did not direct the unlawful divulgence of the message. Did it ratify the act afterwards? If so, it could, in the discretion of the jury, be punished by the assessment of punitory damages. *Topolewski v. Plankinton P. Co.* 143 Wis. 52, 126 N. W. 554. Generally the question of whether or not there has been a ratification is for the jury. *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276. But the evidence relative thereto may be so clear and uncontradicted that the court can say as a matter of law that there has or has not been a ratification. In the present case the trial court held plaintiff was entitled to recover punitory damages, not because it found there had been a ratification, but because the act of defendant's agent was inexcusable, reckless, and wilful. The court says in its instructions to the jury:

"Because in the judgment of the court the wrongful act of the defendant intentionally done by its employee or em-

ployees, without cause or excuse, shows such entire want of care as to raise the presumption of conscious, reckless, and wanton indifference to the rights of the plaintiff and the defendant's duty towards him, and such as is equivalent to an intentional disregard thereof, you are instructed that the plaintiff is also entitled to recover exemplary or punitory damages."

In this the court erred. The action was against the corporation, not against the agent. No matter how wilful may be the act of the agent, the corporation, in the absence of a direction on its part to do the act in the manner in which it is done, is not liable to punitory damages unless it appears that it ratified the conduct of its employee.

It should also be noted that it was error to instruct that plaintiff was *entitled* to punitory damages. When the proper facts exist without dispute, or are found by the jury to exist, then the jury *may* assess punitory damages. It is not compelled to do so. Whether punitory damages shall or shall not be assessed is a matter that must be left to the sound discretion of the jury in each case. The plaintiff is never *entitled* to have them assessed. *Robinson v. Superior R. T. R. Co.* 94 Wis. 345, 68 N. W. 961; *Topolewski v. Plankinton P. Co.* 143 Wis. 52, 126 N. W. 554.

This brings us to the question whether we can say as a matter of law that there was or was not a ratification of the agent's acts by the corporation, or whether that question should have been submitted to the jury.

The testimony on that subject is not in conflict and is given by plaintiff himself. After the tournament closed he sent a letter to Mr. Mohr demanding an investigation of the matter, and a day or two later he testified Mr. Miller came to him and the following conversation took place:

"Mr. Miller says: 'Well, I suppose you are going to put me in jail, are you?' I said: 'No, Miller, I haven't anything against you. I am awfully sorry that you saw fit to do this thing.' And Mr. Miller said: 'Well, I am blamed

for it; I will have to take it.' I said: 'Well, I have written to Mr. Mohr,' and he said he had been communicated with, I don't remember whether he said it was Mr. Mohr or Mr. Parmentier who had spoken to him about it. He said: 'I am going to lose my job.' I replied I was very sorry. I said I thought possibly Mr. Mohr was the man to blame, because I considered from his statement that Mr. Mohr had ordered him to do this."

About ten days afterwards Mr. Parmentier, on behalf of the defendant, came to plaintiff, and he narrates his conversation with him as follows:

"Mr. Parmentier came into my office and asked if I was *Mr. Marlatt.* I said 'Yes,' and he shut the door. He said: 'We have got an awful mix-up here.' I remember his conversation to this extent: He says: 'I have never in my life, as a telegraph operator, seen such a case as this; and for that reason we have been investigating it very closely.' He produced a report, which purported to be a statement of the various parties who had been connected with the transmission of messages between Kenosha and Milwaukee on the nights in question, showing the transmission of these messages both to the Milwaukee Free Press and to the Milwaukee Journal."

"Mr. Parmentier said: 'Now, *Mr. Marlatt,* this is a confidential report of this company, and I have no business to show it to you, but I am very anxious to get this matter settled up, and for that reason I am going to submit to you the whole facts in the case.' He then submitted to me the report, and I ran through a part of it, reading the part that purported to be a statement made by Manager Miller of his blame in the matter. After I had read portions of this report Mr. Parmentier said: 'Now, we are willing to do whatever you want us to do. We will discharge Miller and every man connected with the office, and make a clean-out of it.' I said: 'Why no, Parmentier, I don't care to have you discharge Miller and the rest of the fellows, and put in another bunch, and I would have to educate them.' I told Parmentier: 'What I want is Mr. Mohr.' Mr. Miller advised me that Mr. Mohr told him to get this stuff, and that he acted on Mr. Mohr's suggestion. Parmentier says: 'Well, Mohr is not coming to Kenosha.' After thinking the matter over I

said to Parmentier: 'Well, if Mohr won't come, I will get a warrant for Mohr, and we will get him here that way.' And Parmentier said: 'No, now, don't do that.' He says: 'I will go down and talk to Mohr.' Then Mr. Parmentier left the office, and he came back a half hour afterwards, and he said: 'What time can you meet Mohr and I tomorrow?' And I said: 'Any time you suggest.' He said: 'We will be here at half-past 2 o'clock.' I said: 'All right. Then Mr. Parmentier left, taking the report with him. Mr. Parmentier had a great deal to say about how he was going to clean out the office, and of how this was the first time such a thing had been put over the *Western Union Telegraph Company* and how they were going to send notice to every operator of the company in the United States and Canada calling attention to it, and all that; that kind of conversation; I don't recall it all. It wasn't especially interesting to me. Mr. Parmentier urged me not to make any criminal prosecution, and gave Mr. Mohr a very high recommendation. He said Mr. Mohr was a perfect gentleman and had been with the company a long time and had never had anything to do with anything of this kind before; his name had never been drawn into such a thing. I suggested that I wanted Mr. Mohr brought to Kenosha. Mr. Parmentier came back, after he had talked with Mr. Mohr, and formally made an appointment for half-past 2. The same day he came back in the afternoon, after he had made his appointment with Mohr, I think, by telegraph, and he said: 'Now you won't do anything along this line until after we see you tomorrow?' I said: 'No, but I shall have the district attorney come over when you gentlemen come down tomorrow.' "

The conversation with Mr. Mohr and Mr. Parmentier the following afternoon he details thus:

"Well, Mr. Mohr came in and he said: 'Well, now, I don't know anything about this.' He said it was a matter of office routine. I don't know as it is his exact words. I question whether I could give them. Mr. Mohr said it was a matter of office routine with him, and he was not to blame for it at all, and he didn't know anything about it till the matter was called to his attention by Mr. Miller. Then Mr. Parmentier said: 'I told you Mohr was a good fellow.' I said: 'That is

all right,' and I called the district attorney on the telephone. I walked out of the office and called Mr. Drury. I says: 'We will continue that when he comes.' In the meantime Mr. Parmentier had laid the report down on the table again, and I picked it up and read portions of it." Then when Mr. Drury, the district attorney, came they went into Mr. Simmons's office, where the conversation was continued as follows: "Well, Mr. Parmentier submitted this report that he had to Mr. Drury, and the district attorney read it. I said: 'I don't care for a criminal prosecution of these fellows here,' and Mr. Drury said: 'Of course, you haven't anything to say about criminal prosecutions.' I said: 'No, I want it distinctly understood that I am not interfering with the district attorney's duties in any way.' Mr. Parmentier discussed this report at considerable length. He said: 'We are willing to admit everything you say is true.' . . . He said: 'I have never seen such a case as this in the history of the *Western Union Telegraph Company,* so flagrant a violation of the regulations of the company, and I don't think you will ever hear of such another one.'

"*Q.* Did he say anything about the contents of the report? *A.* He discussed it with Mr. Drury and with Mr. Simmons and myself and with Mr. Mohr. Mr. Mohr was present, and I think then we turned considerably into general conversation, and there was considerable kidding of Mr. Mohr. Some of them suggested that the sheriff take Mr. Mohr back to Milwaukee. We were rather convinced that Mr. Mohr had not official knowledge, that he had not personally been connected with the sending of the telegram asking for the stuff. We wanted to be fair with Mr. Mohr. We told him if he did not personally have that in charge we didn't want to arrest him under any criminal charge, but we couldn't see why Mr. Mohr objected to coming to Kenosha.

"*Q.* Was anything else said there that day, that you recollect? *A.* Mr. Parmentier talked to both Mr. Drury and Mr. Simmons, and he said that the company would see that the men who had been connected with the handling of this matter were discharged, cleaned out entirely.

"*Q.* Did you have any conversations with any representatives of the defendant after this, relative to the transaction? *A.* No."

This is substantially all the testimony in the case on the subject of ratification. It has been set out quite fully because plaintiff claims that, in connection with the fact that Miller is still in defendant's employ, it shows ratification as a matter of law. We shall assume that Miller was not discharged on account of his misconduct, though that fact does not appear by competent evidence. But retention of an employee guilty of a tort is only one fact among others tending to show ratification. It is not conclusive. It may be consistent with the strongest disaffirmance and condemnation of the act, as in this case. Mr. Parmentier said: "I have never seen such a case as this in the history of the *Western Union Telegraph Company,* so flagrant a violation of the regulations of the company, and I don't think you will ever hear of such another one." He told plaintiff, "Now we are willing to do whatever you want us to do. We will discharge Miller and every man connected with the office, and make a clean-out of it." To which plaintiff replied, "Why, no, Parmentier, I don't care to have you discharge Miller and the rest of the fellows and put in another bunch, and I would have to educate them." It is true that when he said that he believed Mohr was the one to blame, but later, when he knew and admitted that Mohr was innocent, he never indicated by a syllable any change in his attitude towards Miller's discharge. He asked that Miller be not discharged, and because his wish was granted he now says the company ratified Miller's acts in not discharging him. Plaintiff cannot blow hot and cold at the same time. The granting of his own request cannot be made the basis of punitory damages. The fact that Parmentier in his talk with the district attorney assured him that the men connected with the handling of this matter would be discharged cannot alter the situation, for, as the district attorney informed plaintiff and as he himself said, he had nothing to do with a criminal prosecution or the district attorney's handling of his branch of the matter. It

seems clear, therefore, that where the evidence shows that the company denounced the tortious acts of its employee in the strongest terms and offered to discharge him and every one connected therewith, but were requested by plaintiff not to do so, and did not, there is no basis whatever for ratification, and nothing to submit to the jury on that issue. Since the case is not one for punitory damages and the compensatory damages are nominal only, the judgment must be reversed.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiff for one dollar, compensatory damages.

KERWIN and ESCHWEILER, JJ., dissent.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN, Respondent.

February 8—April 3, 1918.

Railroads: Closing of grade crossings: Furnishing new crossings: Vacation of parts of streets: Delegation of power to railroad commission: Damages, how assessed and for what: Constitutional law: Eminent domain.

1. Secs. 1797—12*e*, 1797—12*f*, Stats. 1915, authorizing the railroad commission to order the "closing of a highway crossing and the substitution of another therefor not at grade," does not require the furnishing of a separate new crossing not at grade in place of each grade crossing closed, but contemplates that one reasonably convenient crossing not at grade may take the place of several near-by grade crossings.
2. The power of the state to vacate parts of streets may be delegated to the railroad commission, and may be exercised by said commission in carrying out the purposes of secs. 1797—12*e*, 1797—12*f*. Stats. 1915.
3. Where a part of a street is vacated pursuant to said statutes, the

damages are to be assessed in condemnation proceedings instituted by the railroad company under the general statutes on that subject.

4. Such damages are to be assessed only for land actually taken and for the injury to adjacent lots resulting from the change of grade in front of them. The "special damages . . . by reason of such change in the grade," provided for in sub. 2, sec. 1797—12*e*, do not include mere consequential damages to the owners of lots not physically affected, resulting from a vacation of a portion of the street.

5. Sec. 13, art. I, Const., requiring compensation to be made for property taken for public use, does not, when a part only of a street is vacated, require compensation for a depreciation in lots not adjacent to such part by reason of the resulting circuity of approach or reduction of travel and traffic on the street. *Johnston v. Lonstorf*, 128 Wis. 17, overruled on this point; *Tilly v. Mitchell & Lewis Co.* 121 Wis. 1, distinguished.

APPEAL from an order of the circuit court for Dane county: JOHN J. GREGORY, Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the complaint. The action was brought in equity to vacate and enjoin the enforcement of an order of the *Railroad Commission* ordering separation of the grades of the streets and of the plaintiff's tracks for a distance of more than two miles, extending from Chicago avenue in the city of Milwaukee westward through portions of the towns of Lake and Greenfield, closing certain of such streets, providing for crossings not at grade at the other streets, and distributing the work between the railway company, the city of Milwaukee, and the towns of Lake and Greenfield. The plaintiff claimed that the order was void because (1) it assumed to close and vacate streets and highways which the *Railroad Commission* has no power to do, and (2) the *Commission,* in closing a crossing at grade and substituting for this a crossing not at grade, must provide a separate new crossing not at grade for *each* existing grade crossing so closed, and cannot legally substitute one new crossing not at grade for several existing crossings at grade. The case having been argued and taken under

advisement, a reargument was ordered and had upon four specific questions, viz.:

(1) Is the *Railroad Commission* empowered by sec. 1797—12*e et seq.* to wholly vacate street crossings, creating no new crossings in place thereof but compelling the use of other crossings already existing on other streets; or is it empowered only to change the location or grade of crossings, furnishing another crossing in place of each one so changed?

(2) If it has power to wholly vacate crossings, as had been done in the present case, is there any authority or duty on the part of the *Commission* or any other body to assess and pay the damages sustained by lotowners on the street who are specially damaged by the vacation?

(3) Can there be a valid vacation of a part of a street without the assessment and payment of damages to lotowners on the street who are specially damaged by the vacation (see *Tilly v. Mitchell & Lewis Co.* 121 Wis. 1, 98 N. W. 969, and *Johnston v. Lonstorf,* 128 Wis. 17, 107 N. W. 459)?

(4) If the *Commission* had not the power to wholly vacate crossings, as had been done here, must there be vacation of the crossings by the city or town authorities before the *Commission* orders the improvement, or can the improvement be ordered and made dependent on the subsequent vacation of the streets by the proper authorities?

R. N. Van Doren of Milwaukee, for the appellant.

For the respondent there was a brief by *W. C. Owen,* attorney general, and *Walter Drew,* deputy attorney general, and oral argument by *Spencer Haven,* attorney general.

WINSLOW, C. J. The order of the *Railroad Commission* which is attacked in this action was made upon the supposed authority of secs. 1797—12*e* and 1797—12*f,* Stats. 1915, which read as follows:

"*Railroad highway crossings.* Section 1797—12*e.* 1. Whenever a petition is lodged with the commission by

the common council of any city, the village board of any village, the town board of any town, the county board of supervisors of any county, within or bordering upon which a highway or street crosses, or is crossed by a railroad, or within or bordering upon which a highway or street is proposed to be laid out across a railroad, or whenever such petition is so lodged by any railroad company whose track crosses or is about to cross, or is crossed, or about to be crossed by a street or highway, to the effect that public safety requires an alteration in such crossing, its approaches, the method of crossing, the location of the highway or crossing, the closing of a highway crossing, and the substitution of another therefor, not at a grade, or the removal of obstructions to the view at such crossing, or requires the determination of the mode and manner of making such new crossing, and praying that the same may be ordered, it shall be the duty of the commission to give notice to the proper party or parties in interest other than the petitioner, of the filing of such petition, and to proceed to investigate the same and to order a hearing thereon in the manner provided for hearings in section 1797—12, and after such hearing the commission shall determine what alteration in such crossing, approaches, mode of crossing, location of highway crossing, closing of highway crossing, and the substitution of another therefor not at grade, or removal of obstructions to sight at crossing, if any, shall be made, and by whom made, and in case of new crossings the mode and manner of making them.

"2. The commission shall fix the proportion of the cost and expense of such alteration, removals, and new crossings, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public street or highway shall sustain by reason of such change in the grade of such street or highway, or by reason of the removal of obstructions to view at such crossings, to be paid by the railroad company or companies, and the municipality or municipalities in interest. In fixing such proportion the commission may order the amount of such cost and expense and damages so apportioned to be paid by the parties against which the apportionment shall be made.

"3. Whenever the commission shall have ordered or shall hereafter order a separation of the grade of a railway from

the grade of a street or highway in any city, it may, if safe and practicable, and if a necessity exists therefor, order the alteration, restoration and connection of any track serving an industry or industries. Demand for such restoration shall be in writing and filed with the commission within ninety days after the date of the order for the separation of grades or the taking effect of this act, and any such track for which no such demand shall have been made shall be deemed abandoned. If the commission shall order the alteration, restoration and connection of any such track, it shall by its order apportion the cost thereof between the person or persons owning the industry or industries served by such track, the railway company, and the municipality in which said track is located, when in the opinion of the commission such municipality is benefited, or any of them in such proportion as to the commission may seem just and equitable; and the commission shall in its order prescribe the terms and conditions for securing the payment of such cost. The foregoing provision for the alteration, restoration and connection of any such track serving an industry or industries, shall apply to any order of the commission heretofore made, under which order work has not been completed at the time of the passage of this act; provided, that demand therefor is made within ninety days after the passage of this act. The provisions of this subsection are not intended to and shall not affect in any manner pending litigation.

"*Commission's initiative power.* Section 1797—12*f*. The commission may, in the absence of any petition therefor, when in its opinion public safety requires an alteration in any street or highway crossed at grade by any railroad, or railroad belonging to or operated by more than one company, or any change or alteration in such crossing, approaches thereto, mode of crossing, location of highway crossing, closing of highway crossing or removal of obstructions to the sight or view at such crossing, after notice and hearing as provided in section 1797—12, order such alterations in such street, highway, railroad, crossing, approaches to crossing, mode of crossing, location of highway crossing, and may order the closing of such highway crossing and substitute another therefor at grade or not at grade as shall be deemed best by the commission, and said commission shall determine and di-

rect by whom and within what time such changes, improvements and alterations shall be made, and the expense of such alterations, changes and improvements shall be apportioned and paid as provided in the preceding section. Railroad companies may take land for the purpose of this section and the preceding section in the manner provided by law for the taking of land by railroad companies."

The order in question is long and deals with many streets and crossings. It does not seem necessary to attempt to state its contents in detail. The questions raised may be stated and discussed abstractly just as well as concretely, and those questions are as follows:

(1) Does the law require the furnishing of a separate new crossing not at grade in place of each grade crossing closed, or does it contemplate that one reasonably convenient crossing not at grade may take the place of several near-by grade crossings?

(2) If the latter, then, can such power (*i. e.* the power to wholly vacate a part of a street) be legally vested in the *Railroad Commission?*

(3) How are the damages to be assessed and by whom paid?

(4) Does the law provide for the payment of damages to the owners of lots not fronting on or adjacent to the vacated portion of a street or the portion where the grade is changed, but which are injured in value by reason of the fact that the route to them is made longer or more inconvenient?

(5) If there be no such provision, can the law be sustained?

These questions will be considered in the order indicated.

1. In considering the first question it must be at once admitted that the language of the act is not as clear as might be desired. Sec. 1797—12*e* enumerates among the things which may be done by the *Commission* "the closing of a highway crossing and the substitution of another therefor not at grade." It is said that this plainly means the furnishing of

a separate new crossing for each grade crossing closed, and certainly the language used naturally bears that construction. It is susceptible, however, of a broader construction, and the broader construction should be given to it if that be necessary to accomplish the purpose of the law. Now the paramount purpose of the law plainly is the preservation of human life and limb from the terrible dangers which lurk about the grade crossing, and these dangers are the greatest in great cities. No construction should be given to it which would tend to defeat or impair its beneficent purpose. We suppose it to be matter of common knowledge that where tracks are elevated in the larger cities of the country it has not been deemed necessary or desirable that every cross street should be carried over or under the railroad track, especially where the cross streets are only three or four hundred feet apart; a crossing every three or four blocks is the general rule in such situations; indeed it might well be that to insist on an elevated or depressed crossing at every cross street would in many cases be so expensive as to be practically prohibitive. Again, it is quite evident that the general public interest may often, if not always, be promoted by having a few elevated or depressed crossings rather than many, by reason of the lesser expense of maintenance; furthermore, where a single elevated or depressed crossing has been furnished in place of several grade crossings and constitutes a reasonably convenient substitute for each of them, it seems entirely correct to say that there has been, in the case of each highway, the "closing of a highway crossing and the substitution of another therefor."

In consideration of the purposes of the act and the possible results of a very strict construction, we have no difficulty in construing it as thus indicated.

2. Upon the second question there seems to be no serious difficulty. The power to vacate a street is a power belonging to the state, vested primarily in the legislature. It may be

delegated to any appropriate agency of the state, and when that agency acts the state acts. *Fearing v. Irwin,* 55 N. Y. 486; *Brook v. Horten,* 68 Cal. 554, 10 Pac. 204. The *Railroad Commission* is certainly an appropriate administrative body to be chosen for the exercise of this power in such cases as the present.

3. Upon the third question it seems reasonably clear to our minds that the law contemplates that the damages are to be assessed in condemnation proceedings under the general statutes covering condemnation of land by railway companies. The first clause of sub. 2 of sec. 1797—12*e* demonstrates that the lawmakers had the subject of the assessment and payment of the damages in mind, while the closing sentence of sec. 1797—12*f* just as clearly shows that condemnation proceedings by the railroad were intended to provide the means to accomplish the end. It is settled in this state that the changing of the grade of a street adjacent to a lot for the purpose of permitting the street to go over or under a railroad track is a taking of property, *i. e.* real estate, for railroad purposes, for which compensation must be made in condemnation proceedings. *Eisler v. C., M. & St. P. R. Co.* 163 Wis. 86, 157 N. W. 534; *Pabst B. Co. v. Milwaukee,* 157 Wis. 158, 147 N. W. 46. The intention of the law clearly is that the railroad company shall institute condemnation proceedings in which all the damages are to be assessed for land actually taken and for damages suffered by adjacent lotowners resulting from the change of grade in front of their lots, this latter being considered a taking of land within the meaning of the condemnation statute. Of course under the provisions of sub. 2 of sec. 1797—12*e* the *Railroad Commission* must fix the proportion of the damages so assessed to be ultimately paid by the railroad company and the municipalities respectively, but the condemnation proceedings are to be carried through by the railroad company under the condemnation statute.

4. The fourth question must be answered in the negative. The damages provided for by the statute (so far as necessary to be considered here) are "damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public street . . . shall sustain *by reason of such* change in the grade of such street or highway."

The word "special" is not happily used here, for it might easily be construed as referring to remote and consequential damages resulting to lots not in any way physically affected by the work but only suffering a loss in value because they must be reached in a roundabout way; but when we consider the fact that the "special" damages referred to are such only as are sustained "by reason of such change in the grade," it seems that the word cannot refer to mere consequential damages resulting from the vacation of a portion of a street.

We cannot doubt that when the legislature provided for the payment of damages resulting from a change of grade, and in the same act required the railroad company to acquire the property necessary to carry out the provisions of the order by condemnation proceedings, they had in mind the rule of the *Pabst* and *Eisler Cases* and intended to cover by the language used the elements covered in those cases and no more. Clearly the consequential damages suffered by a lotowner whose lot has only lost some of its business or residence value because by the vacation of the street crossing it is not so readily to be reached, cannot be said to have suffered damage from the change of the grade of another street which may be two or three blocks away. The act nowhere recognizes or refers to damages resulting to a lot from the mere vacation of a section of the street to which section the lot is not adjacent.

5. Here we are brought face to face with the decision of this court in the case of *Johnston v. Lonstorf,* 128 Wis. 17, 107 N. W. 459, where it was strongly intimated, if not squarely held, that a statute was invalid which authorized the vacation of a part of a street or alley without first com-

pensating the abutting lotowners, "though their lots may not abut upon the portion so vacated." If this be good law, then it would seem that the act in question cannot be sustained, for, as we construe it, there is no provision in it for the assessment or payment of such damages. Examination of the record in the *Lonstorf Case* shows that the lot in question in that case abutted on the very portion of the alley vacated, hence the question whether damages should or must be awarded to lotowners whose lots do *not* abut on the vacated portion was not in the case and the statement made with reference to such lots was purely *obiter*. But even though it be *obiter* we should not wish to overrule it lightly nor unless well satisfied that it is wrong. Examination of the authorities, however, convinces us that both the reason and weight of authority is the other way in states where (as in Wisconsin) the constitutional requirement is simply that compensation shall be made for property *taken* for public use and not that mere damage to property shall be compensated for. Const. art. I, sec. 13.

The right of access to a lot from the adjacent street is clearly a property right, and, when it is destroyed by vacation of that part of the street to which the lot is adjacent, property is taken which must be paid for. A law which attempts to take away such a property right without compensation cannot be sustained. The law under consideration clearly does provide for compensation for such property rights when (as we construe it) it requires the railroad company to prosecute condemnation proceedings for the purpose of carrying out the provisions of the sections. It does not, however, provide for compensation to lotowners whose lots are not adjacent to the portion of the street vacated, and who consequently have not lost the property right of access, but have been damaged solely because their property has become less valuable for residence or business purposes by reason of the

resulting circuity of approach or reduction of travel and traffic on the street. While the authorities are not unanimous, the great weight of authority is to the effect that the constitutional requirement that compensation be made for property taken for public use does not apply to such damages. In the absence of specific provisions of law requiring their assessment and payment, they are *damnum absque injuria*. *Nichols v. Richmond,* 162 Mass. 170, 38 N. E. 501; 1 Lewis, Em. Dom. (3d ed.) §§ 202 and 206, and cases cited in note 9 to the latter section; 2 Elliott, Roads & Streets (3d ed.) § 1181 and cases cited. As said in the *Nichols Case,* the line must be drawn somewhere on practical grounds. If every lotowner who suffers inconvenience by reason of circuity of approach could demand his damages before a distant portion of the street could be legally vacated, the difficulties in the way of vacation would be very great, for in many cases what might be called the damage zone would extend almost indefinitely in several directions. The case of *Tilly v. Mitchell & Lewis Co.* 121 Wis. 1, 98 N. W. 969, does not in any way conflict with this holding. That was a case where there was an absolutely unlawful attempt to vacate a part of the street, and it was held that a lotowner whose lot fronted on another part of the street but was depreciated in value by the proposed vacation might maintain an action in equity to restrain the threatened unlawful closing of the street. Manifestly the proposition laid down in that case does not decide this case, nor has it any necessary bearing thereon.

These considerations call for affirmance of the order appealed from.

By the Court.—Order affirmed.

OWEN, J., took no part.

BOOHER, Respondent, vs. SLATHAR, Appellant.

March 5—April 3, 1918.

Unlawful detainer: Appeal from justice's court: Trial de novo: Counterclaim: Oral agreement for lease: Statute of frauds: Part performance: Specific performance: Right declared, though specific enforcement impossible.

1. Upon an appeal from the judgment of a justice in an action for unlawful detainer, the case being triable in the same manner as cases originally brought in the circuit court, a counterclaim relating to the same subject matter, *i. e.* the right to possession of the land, is properly pleadable and may be heard and disposed of in the action.
2. Although an oral agreement for the lease of a farm for three years was void under sec. 2304, Stats., yet under sec. 2305 specific performance thereof may be compelled in case of part performance. Thus, if it was definitely and certainly agreed that the lessee should do certain work towards improving the farm and should receive pay therefor, and pursuant thereto he entered into possession and performed to a substantial extent, and if the repudiation of the agreement by the lessor would amount to a fraud, the agreement may be declared valid and be enforced so far as necessary to protect the lessee's substantial rights.
3. Although the time has gone by within which the court could place the lessee in possession again under any agreement which, upon his counterclaim in an unlawful detainer action, may be found to have been made and to be enforceable, he may still have it declared that he was entitled to such relief, since his right against the plaintiff would thereby be affected.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

The appeal is from a judgment of eviction in an action for unlawful detainer.

The defendant in October, 1914, entered into possession of a farm of about 200 acres near Richland Center belonging to the plaintiff. Several prior interviews were had between the parties with reference to the terms and conditions under which defendant should take possession. A form of agree-

ment or lease was drawn by plaintiff's wife, and prior to taking possession of the farm it was read to or by the defendant, who then, as he now claims, objected and claimed that the writing was not the agreement that had been arrived at between the two. He however entered into possession of the farm and continued in possession thereof for more than a year thereafter. Plaintiff served written notice in April, 1915, requiring defendant to give up possession on October 6th following. On October 7, 1915, unlawful detainer proceedings were commenced in justice's court and judgment rendered in favor of the plaintiff, from which judgment defendant appealed to the circuit court.

In the complaint in justice's court plaintiff recited, among other things, that, being in possession of the real estate in question, he let the defendant into possession upon an agreement by which the plaintiff was to furnish the farm machinery, to pay one half of the feed and seed purchased for the farm, and to furnish certain stock, and to pay the defendant fifty cents per rod for tiling done on the farm by the defendant; that defendant was to work the farm in a first-class manner, cultivate the same, and feed the stock thereon on what is known as the "intensive basis," under the directions of the plaintiff, and that defendant was to furnish the repairs and material for operating the machinery and to cut and haul for plaintiff his firewood to Richland Center, and to build and keep fences on the farm in repair, and that they were to share equally in the income and profits; that by the agreement between them the defendant was to deliver up possession of the premises on October 6, 1915, and that there had been an unlawful withholding of the premises after that date.

The defendant's answer admits the making of an oral lease and alleges that the same was to be thereafter reduced to writing, and was for the term of three years and not one year, as claimed by plaintiff, and admitted that certain of the terms and conditions therein were as alleged by plaintiff, and

particularly the promise by plaintiff to pay defendant fifty cents per rod for tiling the farm, and denied certain of the other terms and conditions recited by plaintiff in his complaint.

Defendant also set forth, in what was denominated as a separate defense and counterclaim to the action, a repetition of the answer as to the making of the agreement for the period of three years and the taking possession thereunder; and alleged further that defendant was to build a barn on the premises and was to tile the whole farm wherever it needed tiling, which would take the spare time of the defendant during the whole of the three years, and was to be paid by plaintiff fifty cents per rod for such tiling; that it was further understood that the agreement as reduced to writing was to contain a provision that the defendant should have the option of purchasing the farm at any time during the three years he was in possession at the agreed price of $22,000; that defendant relied upon this oral agreement and moved on the farm with his family of ten children and with a certain amount of feed for the stock and proceeded to build fences, do the tiling, and repair the buildings on the farm. That defendant made the improvements upon the farm relying upon the agreement that he could purchase the place under the alleged option, and that the farm is worth considerably more with these improvements than it was before, and demanded that the oral agreement between the parties be specifically enforced, and for other relief.

Upon the trial in the circuit court the court submitted to the jury but one question, which the jury answered by finding that the oral agreement under which the defendant went into possession contained a provision that the lease contemplated by the parties was to be for the term of three years and not one. It was a conceded fact that the defendant was, under the agreement, to do some tiling on the farm. It is an undisputed fact that three to four hundred rods of such tiling was done by defendant.

After respective motions by the parties the court finally directed the entry of judgment to the effect that there was an unlawful detainer by the defendant and the plaintiff was entitled to restitution of the premises. The case was tried in the circuit court in April, 1916, and the decision of the court and judgment were entered in September, 1916, and from that judgment thus entered the defendant appealed to this court.

L. H. Bancroft of Richland Center, for the appellant.

For the respondent there was a brief by *Lincoln & Brewer* of Richland Center, and oral argument by *F. L. Brewer.*

ESCHWEILER, J. From the rulings made by the court during the trial and his written decision after verdict it appears that he held, in disposing of this case, that the agreement upon which the defendant relied in his counterclaim, being oral, was void under sec. 2304, Stats., which provides that every contract for the leasing of real estate for more than one year shall be void unless in writing; that the forcible entry and unlawful detainer proceedings under ch. 145, Stats., are of such a nature that the court could not properly entertain a counterclaim such as was asserted by defendant, even when the action is pending in the circuit court on appeal; and that inasmuch as additional testimony might have been produced, if an inquiry had been made into the issues raised by such counterclaim, he would express no opinion as to whether there was a contract shown by defendant of sufficient definiteness and certainty to warrant specific performance, if such could be considered; and that the finding by the jury that the oral agreement of the parties was for a term of three years and not one year was supported by the evidence and is a verity herein; and lastly, that although the facts were in favor of the defendant the law was against him, and for that reason the judgment of the justice's court must be affirmed and restitution ordered.

Although the provisions of ch. 145, Stats., providing for

the action of forcible entry and unlawful detainer in justice's court, were intended to furnish a speedy and summary remedy between landlord and tenant, yet it was held at an early day that upon the appeal provided for by the statute to the circuit court from a judgment in justice's court in such action the appellant was entitled to a trial *de novo* even though the judgment was for less than $15, the statutory minimum in all other appeals upon which a trial *de novo* might be had. *Vroman v. Dewey*, 22 Wis. 323. This chapter was thereafter further amended so that by sec. 3370 of the revision of 1878 it provided, as it does now, that "In all cases of appeal from a judgment in an action brought under this chapter a new trial shall be had in the appellate court, and the case shall be tried in the same manner as cases originally brought there, . . ." This action, therefore, being properly in the circuit court upon appeal, it became, for the purposes of this trial, as though originally brought there. The plaintiff's action being with reference to the right of possession to this farm, the defendant's proposed counterclaim related to the same subject matter and was properly pleaded and could be heard and disposed of as a counterclaim on such trial *de novo,* and that should have been done.

While the oral agreement relied upon by defendant for a term of three years was void under sec. 2304, as held by the trial court, the effect of that section is nevertheless qualified by sec. 2305, which is of equal antiquity in our statutes with sec. 2304, and that provides that the power of the court to compel specific performance of agreements in case of part performance thereof is not to be construed as abridged by the letter of such sections as 2304.

If, therefore, the facts herein shall disclose a definite and certain agreement between the parties by which defendant was required to do and perform certain work towards the improving of the farm and to receive pay therefor and that he did enter into possession under such agreement and per-

formed, to some substantial extent, what was required of him, and it shall further appear that the repudiation by the plaintiff of such agreement and his assertion that the same was void under sec. 2304, *supra,* would work inequitably against the defendant or perpetrate a fraud upon him, it may well present a situation authorizing a court of equity to declare such an agreement, if found, as a valid one in existence at the time of the commencement of this action and be enforced so far as necessary to protect defendant's substantial rights thereunder. That the oral agreement partakes of the nature of a lease is no obstacle to the court declaring, on proper showing, that it should be specifically enforced. *Seaman v. Aschermann,* 51 Wis. 678, 8 N. W. 818; *Henrikson v. Henrikson,* 143 Wis. 314, 127 N. W. 962; *Kipp v. Laun,* 146 Wis. 591, 602, 131 N. W. 418; *Halligan v. Frey,* 161 Iowa, 185, 141 N. W. 944, 49 L. R. A. N. S. 112, note.

That the time has gone by within which the court could place the defendant in possession again under any agreement that may be found to have been made and enforceable does not affect the right of the defendant, if otherwise entitled to such relief, to have that declared even at this late date. It manifestly would affect his rights as against the plaintiff in this case and any proceedings subsequent to and upon any judgment of unlawful detainer herein.

The facts and records not being all before us, we regret that this protracted litigation cannot be disposed of finally here and now, but it must therefore be remanded and further proceedings had in the court below in accordance with what is here determined.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to take further proceedings in accordance with this opinion.

A. BRESLAUER COMPANY, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

March 5—April 3, 1918.

Workmen's compensation: Accident resulting in death: Evidence: Report and answer of employer: Hearsay: Harmless error: Witnesses: Competency: Claimant widow: Transactions with deceased: Failure to give notice of injury: Effect: Burden of proof.

1. Where an employee fell from a ladder and nine days later died of pneumonia, the employer's report of the accident, stating that the employee was not injured, and the answer before the industrial commission, stating that the injuries were slight and had no connection with his death, were evidence of the accident only.
2. Evidence in such case that the employee was externally bruised and suffered much pain, together with testimony of physicians tending to show that the trauma caused by the fall was likely to result in pneumonia, which caused his death, is *held* to support a finding by the industrial commission that the death proximately resulted from the fall.
3. In an action to review an award by the industrial commission the admission of hearsay evidence was harmless error where the trial court, in its opinion, expressly states that such evidence was not considered, and there is sufficient competent evidence to support the decision.
4. The widow of a deceased employee, claiming compensation under the statute for his death, is not incompetent under sec. 4069, Stats., to testify to transactions and communications (not private) with the decedent.
5. Failure to give the notice required by sec. 2394—11, Stats., did not preclude recovery of compensation for the death of an employee, where the employer had actual notice of the accident within ten days and there was no intention to mislead the employer and he was not in fact misled by said failure.
6. The burden of proof, in such a case, is upon the employer to show that he was misled and prejudiced by the failure to give the statutory notice of injury.

APPEAL from a judgment of the circuit court for Dane county: GEORGE GRIMM, Judge. *Affirmed.*

Ludwig Bergenthal, a man about forty-nine years of age, was in the employ of the appellant, *A. Breslauer Company,*

at the time of the alleged accident, and while getting a box down from a pile of boxes fell from a ladder to the floor. He resumed work immediately. The fall occurred Friday, April 21, 1916. He returned home at about 6:30 p. m., went to church in the evening, worked until quitting time the next day, went to bed that afternoon and remained there until Monday morning, went back to work Monday morning, returned home at noon and again went to bed, got up on Tuesday and went to bed again Wednesday, April 26th, and died Sunday, April 30th, of pneumonia.

The above named appellant in its answer before the *Industrial Commission* admits that Ludwig Bergenthal was injured April 21, 1916, but alleges that such injuries were slight and had no connection with his death. Considerable testimony was taken before the *Commission* respecting the accident and injuries resulting therefrom, including expert evidence of physicians, and the *Industrial Commission* made an award ordering that the appellant and General Accident, Fire & Life Assurance Corporation, Ltd., pay to the applicant, *Clara Bergenthal,* one of the respondents here, the sum of $2,614.49 in full discharge of all liability. The award was reviewed before the court below and the contention made that there was no evidence that Bergenthal sustained injuries while in the employ of the appellant, and that there was no evidence that his death resulted from such injuries, and that no notice of the alleged injuries was given within thirty days as required by law, and that no award should be made against the General Accident, Fire & Life Assurance Corporation, Ltd.

The court below modified the award by eliminating the General Accident, Fire & Life Assurance Corporation, Ltd., from its operation because it was not a party to the proceeding and did not appear therein and no liability on its part was shown. Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Lines, Spooner & Quarles* and *James T. Guy* of Milwaukee, and oral argument by *Charles B. Quarles.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

KERWIN, J. The only matters before us for consideration are (1) whether the court erred in holding that there was competent evidence in the record to support the finding of the *Commission* that Bergenthal died as a result of injuries sustained while in the employ of the appellant; and (2) whether the court erred in holding that applicant's failure to give notice as required by sec. 2394—11, Stats., was not a bar because the employer was not in fact misled thereby.

1. The report to the *Industrial Commission* and the admission in the answer of the appellant are sufficient proof of the accident in this case. *First Nat. Bank v. Industrial Comm.* 161 Wis. 526, 154 N. W. 847. This is conceded by counsel for appellant, but it is contended that the report and admission cannot be considered as evidence of any further fact and that they are not admissions that deceased was injured by the fall, and further that the evidence was not sufficient to sustain the finding of the *Commission* to the effect that the injuries sustained by the deceased were caused by the accident, which injuries resulted in the death of said Bergenthal.

We are of opinion that the report and admission in the answer are evidence only of the accident; but aside from the report and admission the evidence was ample to support the findings of the *Commission* and the court below to the effect that Bergenthal died as a result of injuries sustained while in the appellant's employ. Considerable evidence was of-

fered in the case tending to show discoloration on parts of deceased's body, pain and suffering, headache, and restlessness, as well as expert testimony of doctors, all of which tended to show that the trauma caused by the fall was likely to result in pneumonia, which caused the death of Bergenthal. The learned trial judge below in his opinion, after reviewing the evidence, tersely states his conclusion thus:

"The finding of the *Commission* that the death of Bergenthal proximately resulted from his fall is not open to the charge of being mere conjecture. It is rather the reasonable and logical inference and deduction from the sufficiently established facts in the case. Internal traumatic injuries do result from concussions incident to falls, pleurisy does develop from internal trauma, pneumonia does follow pleurisy, and death does follow pneumonia—not always, perhaps not even as a general rule, but certainly at times and under conditions such as existed in this case. The deceased, previously healthy, did have a fall of considerable severity, he was externally bruised, 'black and blue,' suffered great pain, and in the logical time he developed pneumonia and died. If under these circumstances the *Commission* was convinced that causal relation existed between the fall and death of the deceased, it was an exercise of judgment based on established facts, and the court cannot interfere."

Some point is made that hearsay evidence was allowed, but the court below in his opinion in the case expressly states that in his determination of the matter all hearsay testimony was excluded and not considered by him in arriving at his decision. It is clear that there is sufficient competent evidence to support the award.

Contention is made by counsel for appellant that the testimony of the widow, *Clara Bergenthal,* respondent here, was incompetent, because contrary to sec. 4069, Stats., which provides that "No person . . . in his or its own behalf or interest nor any person . . . from, through or under whom a party derives his interest or title, shall be examined as a witness in respect to any transaction or communication by him person-

ally with a deceased person. . . ." This contention is unsound. The widow here does not claim "from, through or under" deceased. Her claim is by force of and under the statute, not from or through deceased. She does not derive her interest from, through, or under deceased. Her right to recover is based upon the statute. *Robertson v. Dow,* 155 Wis. 605, 145 N. W. 652.

2. It is further contended that the court erred in holding that the applicant's failure to give the notice required by sec. 2394—11, Stats., precludes recovery. This statute requiring notice contains the following provision:

". . . that any payment of compensation under sections 2394—3 to 2394—31, inclusive, in whole or in part, made by the employer before the expiration of said thirty days, shall be equivalent to the notice herein required; and provided, further, that the failure to give any such notice, or any defect or inaccuracy therein, shall not be a bar to recovery . . . if it is found as a fact in the proceedings for collection of the claim that there was no intention to mislead the employer, and that he was not in fact misled thereby; . . ."

We think the instant case comes clearly within the above provision. The *Commission* found upon sufficient evidence "that no written notice was served upon the respondent within the thirty-day period required by law, but that respondent had actual notice of the accident within ten days. That there was no intention on the part of the applicant to mislead respondent by failure to give notice, and that respondent was not in fact misled thereby."

The burden of proof to show that appellant was misled and prejudiced by lack of notice was upon appellant. *Pellett v. Industrial Comm.* 162 Wis. 596, 156 N. W. 956.

The circuit judge in his opinion in the case stated:

"I am also of the opinion that the facts warrant the finding that the *A. Breslauer Company* had actual knowledge of the injury at the time it occurred, and that in no event was there any intention on the part of any one to mislead said

company, nor was said company in fact misled by failure to give the statutory notice."

Upon the whole record we are convinced that no error was committed upon the trial and that the judgment below is right and should be affirmed.

By the Court.—Judgment affirmed.

OWEN, J., took no part.

METHODIST EPISCOPAL CHURCH BARACA CLUB, Appellant, vs. CITY OF MADISON, Respondent.

March 5—April 3, 1918.

Taxation: Exemption: Construction of statutes: "Benevolent association."

1. Statutes exempting property from taxation are not to be enlarged by construction.
2. A church club which was organized to provide for Bible study and for religious, social, and moral culture, and to maintain a home for its members, to whom no pecuniary benefits are ever to be paid, and which maintains a clubhouse as a home for its members, renting rooms to nonmembers when not desired by members, operating a public café, furnishing a meeting place for a Bible study class and aiding it to maintain interest in its work and to secure new members, but whose benevolent activities, properly so called, have consisted in securing positions for a few young men and furnishing a small number of free meals, is not a "benevolent association" whose property is, under sec. 1038, Stats., exempt from taxation. ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action brought to recover taxes paid to the city of *Madison,* on the ground that the property on which they were levied is exempt from taxation. Appellant is a corporation organized under the provisions of ch. 86 of the

Statutes, without capital stock. As set forth in the articles of incorporation, its purposes are to provide for the study of the Bible and for religious, social, and moral culture and the obtaining and carrying on of a home for the club. No pecuniary benefits shall ever be paid to any member. Only members of the Baraca Bible Class of the Methodist Episcopal Church are eligible to membership in the club. Applicants must receive a five-sixths vote of the board of directors. There are membership dues of $5 per annum. The membership of the club is from thirty to forty, and varies from time to time. There are two general reading rooms, two large rooms on the first floor used for club purposes, containing a piano and victrola in the parlor, a general supply of books and periodicals in the reading room, and a few sets of chess and checkers that are very much used. The rooms in the clubhouse are rented to members. A rule of the house gives a club member preference. Any club member who wishes to come in can have the room occupied by a nonmember. Table board is also supplied. The board is arranged by meal tickets, so much for a meal. Tickets are sold to members and others. There is a house secretary who is manager of the house. The appellant opened the house or club on February 21, 1916. During the remainder of 1916 and the four months of 1917 its income was as follows: dues from members, $311.82; room rent, $1,106.93; board for the same period, $5,278.98, making a total income of $6,697.73. In addition to this income appellant made a loan of $500, making the total receipts $7,197.73. The total disbursements of the club during the same period were $7,137, which disbursements were made for groceries, meat, ice cream, ice, gas, light, telephone, fuel, labor in kitchen and for care of rooms, laundry, miscellaneous expenditures, payment on land contract, insurance, repairs, plumbing, electric-light fixtures, for victrola, records, and furniture. They have lectures in the clubhouse every two weeks during the winter season.

To these lectures they often invite others besides the club members. There is a Bible study class every Monday evening and study class every Tuesday evening on the subject "Mind of the Master," a religious work, to which every one is invited that they can get. It meets in the clubhouse. Club members and class members and all the young men try to get other young men, invite them down there to supper occasionally, and then invite them to stay to Bible class. After that they have a mixer, so to speak, and get acquainted with the invited guests. The club aids the Baraca class in keeping up its interest in all these religious activities. They invoke blessing at the table. The record discloses that positions were secured for perhaps half a dozen young men. The only evidence that the funds of the appellant club have been used for benevolent purposes is that flowers were sent to one young man sick in the hospital which were paid for by special subscription. Some meal tickets were furnished on credit which were paid. A few scattering meals were furnished free.

The city of *Madison* imposed, and collected, taxes upon the clubhouse property. The corporation filed its claim with the city council of the city of *Madison* for a repayment of the tax, claiming the property to be exempt on the ground that it was the property of a benevolent society. From a disallowance of the claim by the city council an appeal was taken to the circuit court, where judgment was rendered against the corporation, and from that judgment the corporation appealed.

For the appellant there was a brief by *Hall, Baker & Whitcomb* of Madison, and oral argument by *Frank W. Hall.*

William Ryan of Madison, for the respondent.

OWEN, J. Sec. 1038, Stats., provides—sub. (3)—that "Personal property owned by any religious, scientific, literary, educational or benevolent association, . . . and the real

property necessary for the location and convenience of the buildings of such association and embracing the same, not exceeding ten acres," is exempt from taxation. Appellant claims that it is a benevolent institution. Exemption from taxation of property devoted to charity or benevolent purposes is made on the ground that such institutions perform services for the public and, to some extent at least, relieve the state from expense.

"The benevolent purposes of such an organization as the statute contemplates are, in a measure, akin to charitable purposes, in that they bestow benefits through their efforts and means on either its members or the public by assisting the needy or promoting some benefaction by advancing and supporting agencies of a beneficial public nature." *Green Bay Lodge v. Green Bay,* 122 Wis. 452, 458, 100 N. W. 837.

In that case exemption was denied the Elks clubhouse because, it was said:

"While some of the aims of the order are the promotion of benevolence and charity, it is the avowed and obvious purpose of the order to maintain this clubhouse as a suitable place for the members and their families to congregate for entertainment, amusement, and to provide refreshments. The bestowal of these privileges and benefits is not of a benevolent or charitable character. These privileges and benefits which every person may secure for himself and family for a consideration, according to his tastes, wishes, and means and which the members of this lodge thus provide by co-operation as a body for their mutual advantage, are not of a benevolent character, and serve no such purpose."

The *Baraca Club* seems to maintain the premises in question as a home for its itinerant members and those with no fixed place of abode in the city. Rooms are maintained which are rented to nonmembers only when they are not desired by members. A restaurant or café is operated which the public is invited to patronize. There is no evidence that either rooms or meals are furnished at reduced rates, or that such service is confined to the poor and needy, or that any

one benefits by these activities. Upwards of $7,000 was expended by the club between the time it started and the time of trial. The record discloses fully and in detail the purposes of these expenditures, from which it appears that substantially the entire sum was dispensed for expenses of maintenance, restaurant supplies, club furniture, club comforts, and in liquidation of the clubhouse debt.

Bible studies and religious observances on the part of the occupants of the club were shown, but they were such as usually prevail in religious homes, and simply mark the natural and to be expected inclinations of the members of a religious club and constitute an attraction for new members of similar tastes. Besides, appellant is not claiming exemption on the ground that it is a religious institution.

The activities of the club that may be characterized as benevolent seem to have consisted in securing positions for a few young men and in the furnishing of an inconsequential number of free meals. This is wholly insufficient to give it the cast of a benevolent society. The pervading and dominant purpose of the club was to furnish a home and a meeting place for the members of the Sunday school class; to maintain interest in the work of the class, and to facilitate the acquiring of new members thereof.

That the purposes of the club are laudable and its influence wholesome there can be no doubt. But statutes exempting property from taxation are not to be enlarged by construction. Taxation is the rule and exemption the exception. He who claims exemption must bring himself within the terms of the exception. We do not regard this as a doubtful or border-line case, and deem it unnecessary to refine upon the character of a benevolent association within the meaning of this statute.

Appellant cites the case of *St. Joseph's H. Asso. v. Ashland Co.* 96 Wis. 636, 72 N. W. 43, and numerous decisions from other states holding the property of Young Men's

Christian Associations exempt under the statutes of such states. A most casual comparison reveals a wide and striking gap between the benevolent activities of those associations and those of the *Baraca Club,* both in character and extent. They do not constitute authority for appellant's contention. We are satisfied with the judgment of the lower court.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). The plaintiff, as appears by the express terms of its charter and the evidence, is not organized for any pecuniary benefit to its members, and any mercenary object is therefore expressly excluded. The purposed reasons for its existence, as expressed by its articles of association, are supported by the evidence as to the manner of its existence and seem to me to take it without the class of those associations whose purpose is to provide entertainment and amusement for their members and to bring it within the wide field of benevolent associations intended to be fostered and encouraged by the exemption statute here involved.

The quantum of the result attained, especially in the early years of the existence of any such organization, cannot properly be made the standard by which benevolent purpose is to be ascertained, any more than was quantity the standard with the widow's mite.

MINER, Appellant, vs. TOWN OF ROLLING, Respondent.

March 6—April 3, 1918.

Highways: Sufficiency: Injury from defect: Questions for jury: Instructions to jury: Verdict: Perverseness.

1. A highway which crossed a ravine thirty feet wide upon a fill or embankment about four feet deep at the deepest place and having a hard, smooth surface about twelve feet wide at the narrowest point, and not wide enough at any point for two automobiles to pass each other safely, was not defective as a matter of law, where the highway was straight at that place so that cars coming in either direction could be seen at a considerable distance.
2. An instruction to the jury under which it was left to them to consider, in passing upon the sufficiency of such highway, the depth of the fill, its precipitous sides, the absence of a barrier, the presence of growing brush, and all the other facts and circumstances shown by the evidence, is *held* to have been correct and adequate.
3. In an action against a town for injuries alleged to have been caused by an automobile running off from a narrow embankment upon which a highway crossed a ravine, there being evidence which would have warranted the jury in finding that the car did not go over the embankment but down the side of the ravine, the court properly charged the jury upon the subject of a traveler voluntarily or without cause leaving the traveled track.
4. An instruction in such case that if the town prepares a traveled track reasonably safe and wide, and sufficient for travel, it is not liable for accidents occurring thereon, was not improper on the ground that it informed the jury of the effect of their answer, in the special verdict, to the question as to the sufficiency of the highway.
5. The giving to the jury of general rules of law appropriate to the particular question of the special verdict in connection with which such rules are given, is not error.
6. In an action for injuries alleged to have been caused by a defective highway, a special verdict finding that the highway was sufficient and that the plaintiff's damages were "nothing," is *held* not to have been perverse because of the latter finding, it appearing that the jury understood the effect of the first finding and naturally concluded that plaintiff was entitled to no damages.

APPEAL from a judgment of the municipal court of Langlade county: T. W. HOGAN, Judge. *Affirmed.*

Action to recover damages for injuries sustained by reason of an alleged defective highway. Plaintiff, her mother, her sister, Mrs. Stewart, and her three children were riding in a Ford car at the time of the accident. Mrs. Stewart drove and had with her on the front seat two of her children. The other one occupied the rear seat with her sister and mother. They drove south from Antigo some distance, and as it was getting late they turned back to Antigo. They lighted the lights, and a short distance from the place of the accident Mrs. Stewart got out and turned the lights up higher. The road ran nearly north and south and crossed a depression or ravine of about thirty feet in width that had been filled by an embankment varying in width from eleven feet four inches to fourteen feet. Defendant's evidence was to the effect that it was at least twelve feet wide at the narrowest point. The road had been built about twenty years previously, and no work had been done on it at this place for about six years. The sides of the embankment were abrupt, overgrown with brush close up to the top, and were about four feet deep at the deepest point. The surface of the road was smooth and hard and the traveled track was substantially in the center of the embankment. In coming from the south there was a slight grade down to the fill, and two automobiles could not pass each other on the embankment with safety. Mrs. Stewart's testimony is to the effect that as she came down to the fill she noticed some stones in the wheel track; that she tried to avoid them, and the next she knew the car had run over the embankment at its deepest place and had turned completely over. The defendant's evidence is to the effect that plaintiff's car left the traveled track before the fill was reached, ran through the brush down the steep side of the depression, struck a log, and turned over. Plaintiff

claims the defendant was negligent in maintaining such a deep, narrow fill without fences or barriers on the sides and in permitting brush to grow close up to the top of the fill. The court submitted the issue to the jury in the form of a special verdict and they found (1) that the highway at the time and place in question was sufficient for public travel; (2) that no want of ordinary care on the part of plaintiff, or of the driver of the automobile, proximately contributed to produce plaintiff's injuries; and (3) that her damages were "nothing." The plaintiff appealed from a judgment entered upon the special verdict in favor of defendant.

Arthur Goodrick of Antigo, for the appellant.

C. J. Te Selle, attorney, and *Henry Hay,* of counsel, both of Antigo, for the respondent.

VINJE, J. The contention of plaintiff that the highway was insufficient as a matter of law cannot be sustained. The town made a fill of about four feet at the deepest place across a depression of thirty feet in width and provided a hard, smooth surface eleven feet four inches wide at its narrowest point, or of twelve feet if defendant's evidence is believed. Such highway the jury might well find sufficient in view of the character of the country through which the highway ran. True, it was one of the main traveled highways of the town and had considerable travel upon it. The fact that two cars could not pass at all upon part of the fill and could not pass safely upon any part of it did not make it defective as a matter of law. It is common knowledge that there are, and under present conditions must be, many places, especially upon fills, where cars cannot pass each other. This fill was only thirty feet long upon a straight part of the highway where cars coming in either direction could be seen for a considerable distance, so it was easy for one car to wait until the other passed the fill if they met at that place. In in-

structing upon the question of the sufficiency of the highway the court said:

"You should also, in answering this question, take into consideration the ravine, and character of the fill, and if it concealed the nature of the ground, and any other object or obstacle, and determine whether they were in such close proximity to the traveled and worked portion of the road and so connected with it as to make it defective or unsafe, also the grade of the road and all surrounding facts and circumstances as shown by the evidence, and answer the question by 'Yes' or 'No' as you think the evidence warrants."

This was a correct and adequate instruction which left to the jury to consider and pass upon the sufficiency of the road in view of the depth of the fill, the precipitous sides, the absence of a barrier, the presence of the growing brush, and all the other facts and circumstances disclosed by the evidence.

In view of the evidence on defendant's part tending to show that plaintiff's car left the traveled track before the fill was reached, no error is perceived in the court charging the jury on the subject of a traveler voluntarily or without cause leaving the traveled track. The evidence would have warranted the jury in finding that the car did not go over the embankment at all, but down the side of the ravine.

In the court's instruction relating to the sufficiency of the highway are found expressions to the effect that if the town prepares a traveled track reasonably safe and wide and sufficient for travel it is not liable if accidents occur. This is excepted to and claimed to be reversible error on the ground that it informs the jury of the effect of their answer, and *Van de Bogart v. Marinette & M. P. Co.* 127 Wis. 104, 112, 106 N. W. 805, is relied upon to sustain the claim. The subject of when information disclosing the effect of the jury's answer constitutes reversible error was quite fully treated in the later case of *Banderob v. Wis. Cent. R. Co.* 133 Wis. 249, 113 N. W. 738, where the cases are collected and discussed. We shall make no attempt to treat the subject anew, but con-

tent ourselves with saying that the present case falls under subdivision (3) of that case, found on page 287, stating that "the giving to the jury of general rules of law appropriate to the particular question of the special verdict in connection with which such rules are given is not error." The general rule of law that if a town furnishes a sufficient highway it is not liable for accidents occurring thereon, if not known to the jurors before they sat in the case, certainly must have been made plain to them by the claims and arguments of counsel long before the court instructed them. If it was not, either the attorneys failed to properly try the case or else the jury were so dense that they could be neither harmed nor benefited by any instruction of the court.

The trial court disposed of the claim that the verdict was perverse because the jury assessed the damages at "nothing," by stating that "it conclusively appears that the jury understood the force and effect of its answer to the first question, and by holding the road sufficient and safe for travel by persons using ordinary care they naturally concluded that plaintiff was entitled to no damages and so answered." It was conceded that plaintiff sustained some damage and the jury undoubtedly so understood. That being the case, the explanation given by the trial judge of the jury's answer seems the only logical and rational one. He was much better able to judge of the jury's conception of the case than we are, and we shall adopt his explanation as ours.

This disposes of all material errors assigned that could have adversely affected the jury's action, with the result that no prejudicial error is found.

By the Court.—Judgment affirmed.

WEYMOUTH, Appellant, vs. GRAY and others, Respondents.

March 6—April 3, 1918.

Vendor and purchaser: Nature of vendor's title under will: Defeasible fee.

A widow who, under her husband's will, took the absolute title to real property subject to be defeated by her remarriage, and was not given the power of disposition, cannot convey a good and marketable title in fee simple.

APPEAL from an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *D. E. Roberts* of Superior, and for the respondents on that of *Grace & Fridley* of Superior.

WINSLOW, C. J. This is an action brought by the vendor for specific performance of a contract to sell and convey land. The plaintiff appeals from an order overruling a general demurrer to the answer. The question raised is whether, under the allegations of the answer, the plaintiff can convey a good and marketable title in fee simple to the land.

Plaintiff's title is derived from the will of her deceased husband, Daniel A. Weymouth, by which the testator directed that all of his property should go to the plaintiff "so long as she shall remain single;" in case of her marriage she to have the homestead and one third of all other property, the balance to go to the testator's brothers and sisters. The will was construed by this court in the case of *Will of Weymouth,* 165 Wis. 455, 161 N. W. 373, and it was held that it gave to the plaintiff absolute title to the property (other than the homestead), subject to be defeated by breach of the limitation in the will. The property in question here is a part of the property other than the homestead. We think it very plain that the plaintiff cannot convey an absolute fee

simple. It is not necessary to bestow any name upon her title. We are paying less regard to the technical names of estates and the refined distinctions which were the joy of the ancient real-estate lawyers every year. The testator was entitled to give the plaintiff just such an interest as he chose in the property, providing it was not forbidden by or contrary to the statute. He chose to give her an estate which would terminate (as to two thirds of the property) if she married again. He intended his brothers and sisters to take the two thirds upon the happening of that event. Manifestly he did not intend that the plaintiff should have the power to defeat the claim of his brothers and sisters simply by making a conveyance of the property. There is nothing in the statutes contrary to such a disposition of real property; in fact the statute seems to contemplate it favorably. Secs. 2051, 2056, and 2059. The will does not invest the plaintiff with the power of disposition, in addition to the estate granted, as in *Roberts v. Lewis,* 153 U. S. 367, 14 Sup. Ct. 945. No words in the will indicate the wish of the testator to invest the plaintiff with that power.

By the Court.—Order affirmed.

QUAM and others, Appellants, vs. CITY OF FORT ATKINSON and others, Respondents.

March 6—April 3, 1918.

Municipal corporations: Street improvements: Statutory plans: Material to be used: Rights of abutting owners: Assessments not to exceed benefits: Constitutional law.

1. The right given by sub. 2, sec. 925—175, Stats. 1915, to the owners of property fronting upon a proposed street improvement in a city of the third or fourth class, to designate, by petition to the council, the paving material which shall be used, applies only to improvements made pursuant to said sec. 925—175, and

has no application where the proceedings for the improvement were under secs. 959—30*a* to 959—30*j*.

2. The plan for street improvements provided for in sec. 925—175, Stats. 1915, and that provided for in secs. 959—30*a* to 959—30*j* are separate and distinct, and cities to which both are applicable may choose between them.
3. Under sub. 1, 8, sec. 959—30*f*, Stats., a city, by clear implication, can assess to any abutting parcel of land no more of the cost of a street improvement than the amount of benefits accruing therefrom to such parcel.
4. Assessment of a part or all of the cost of street improvements upon abutting property to the extent of the benefits accruing thereto is not a taking of property for public use without just compensation, within the meaning of sec. 13, art. I, Const.

APPEAL from an order of the county court of Jefferson county: R. B. KIRKLAND, Judge. *Affirmed.*

The appeal is from an order sustaining a general demurrer to the complaint of the plaintiffs.

This action is brought to restrain the defendants, as city officers, from carrying out proceedings to pave Whitewater avenue in the city of *Fort Atkinson* with a permanent pavement having a concrete foundation. The facts alleged in the complaint are as follows:

That *Fort Atkinson* is a city of the fourth class and is governed by the general city charter law; that Whitewater avenue is a public street, and the plaintiffs each own real estate abutting upon the portion of the avenue included within the proposed improvement; that Whitewater avenue is paved with macadam, which is in a fair condition of repair, and at a reasonable cost could be put in good condition at much less expense than the improvement contemplated; that after the council resolved to pave Whitewater avenue with a permanent pavement having a concrete foundation the owners of more than one half of the frontage to be affected by the proposed improvement filed their written petition with the council requesting that no concrete foundation be laid and that said avenue be remacadamized with crushed stone and asphaltic binder, which petition has been wholly disregarded

by the city officers, who persist in proceeding with their plans for installing the proposed improvement; that either form of improvement will cost over $500, and the abutting property, excepting for street intersections, will be assessed to pay the cost of such improvement to the extent of benefits received; that the expense of the pavement proposed by defendants will be much greater than the improvement requested by the petitioners and greatly in excess of what the value of the abutting property warrants and the necessities of travel require, and that the present pavement will be destroyed. The complaint quotes amendments to the general charter law referred to hereafter, and demands judgment against defendants determining and adjudging that the resolution and all proceedings taken thereunder be held null and void and that the defendants be enjoined from taking any further action to pave Whitewater avenue, and that the plaintiffs have such further order, judgment, and relief as may be equitable and just, together with their costs and disbursements in this action.

The defendants demurred to the complaint on the ground that it appears upon the face thereof that the same does not state facts sufficient to constitute a cause of action. The county court entered an order sustaining the demurrer, with leave, however, to the plaintiffs to amend their complaint within twenty days from the date of service of such order on the plaintiffs' attorney and the payment of $10 costs. From this order appeal is taken.

Wm. R. Curkeet of Madison, for the appellants.

Charles B. Rogers of Fort Atkinson, for the respondents.

SIEBECKER, J. The plaintiffs, as abutting property owners, assert that they have the right to restrain the defendants, as city officers, from further prosecution of the proceedings to improve Whitewater avenue with a permanent pavement having a concrete foundation as prescribed by secs. 959—30*a* to 959—30*j*, Stats. It is claimed by plaintiffs that the rights conferred on them by sub. 2 of sec. 925—175 can be

invoked against the contemplated action of the common council. This subsection was added to sec. 925—175 by ch. 487, Laws 1915, which provides that the existing provisions of this section shall be retained and be numbered subsection 1 and that a new subsection is added, numbered 2, which provides in substance that when the street improvement contemplated by this statute is undertaken by cities, owners of property fronting on such street may, within the prescribed time "after the council determines" to make the improvement "as provided in subsection 1 of the section," petition the council in writing requesting that "said part of said street, alley or court" be improved "with certain material and the council shall let the contract" for such improvement with the kind of improvement specified in the petition. The plaintiffs claim that this amendment to this section of the general city charter law embraced in ch. 40*a*, Stats., confers on them, as property owners fronting on the contemplated street improvements, the right to limit by petition the powers of the city council in making this improvement pursuant to the powers conferred by secs. 959—30*a* to 959—30*j*, Stats. An examination of the provisions of the amended sec. 925—175 discloses that there is nothing in the phraseology of the statute indicative of a legislative intent that the power thereby conferred on lotowners is applicable to and limits the powers conferred on city councils by other statutes, nor do the terms of this statute conflict with those of secs. 959—30*a* to 959—30*j*. The amendment of sec. 925—175, Stats., by adding the provision of sub. 2, naturally and reasonably indicates that the legislature intended thereby to restrict the power conferred on the common council in this section by the right conferred on the lotowners whenever street improvements were made under this section of the general charter law. Furthermore, it is expressly declared in secs. 959—30*a* to 959—30*j* that any city may make the street improvement therein provided and that these sections of the

statutes "shall not be construed as repealing any provisions of the statutes, but shall constitute and prescribe a mode of making city improvements which any city may follow in any instance, if the common council of such city shall so elect" (sec. 959—30*j*). The two plans for street improvements provided for by the foregoing two legislative schemes are entirely separate and distinct and it must be held that each stands independently of the other and that they present an option to cities coming within both statutes which one shall be followed. This harmonizes with what was said in *Dunn v. Superior,* 148 Wis. 636, 135 N. W. 145, and *Weise v. Green Bay,* 143 Wis. 198, 126 N. W. 681. The detailed provisions of these statutes as embodied in each of these statutory plans for street improvements contain many differing elements which differentiate the two plans in such ways as to clearly indicate that they were intended to stand separately and afford to cities included therein a choice between them. It must be held that the plaintiffs had no right to petition the common council to order the contemplated street improvement in conformity with the requests of the plaintiffs.

It is contended that if the council proceeds with the improvements under secs. 959—30*a* to 959—30*j*, Stats., then the council should be restrained because the proceeding is invalid upon the ground that these statutes authorize a special assessment upon abutting property in excess of the benefits derived therefrom. This claim overlooks the express provisions of sub. 1, 8, sec. 959—30*f*, whereby the board of public works is charged with determining the benefits and damages which shall accrue from such improvement to property affected thereby and the amount "that should be assessed to each parcel of such real estate as benefits accruing thereto" by such improvement and the power of the common council to "determine the amount to be paid by the real estate as benefits on account of such improvement . . . and the amount

that shall be paid by the city at large or the ward funds or the wards in which the improvement is made." By clear implication the city is thereby limited to assess no more of the cost of improvement to each abutting parcel of land than the amount of benefits accruing thereto by such improvement. This negatives the plaintiffs' claim that the city may assess any amount of the costs of such improvement against abutting real estate in excess of the benefits accruing to such property by the improvement. The power to so assess a part or all of the costs of the improvement upon abutting property to the extent of the benefits accruing thereto is generally recognized in the decisions as no infringement of the rights of an abutting owner guaranteed him by sec. 13, art. I, of the state constitution, that "The property of no person shall be taken for public use without just compensation therefor." It is considered that the trial court properly sustained the defendants' demurrer to the complaint.

By the Court.—The order appealed from is affirmed.

HOLLINGWORTH and another, Appellants, vs. SHANNON and another, Respondents.

March 6—April 3, 1918.

Pleading: Striking out immaterial matter: Attorney and client: Reasonableness of fee charged: Evidence: Relevancy: Trial: Setting aside verdict.

1. In an action to recover a part of the amount charged and retained by attorneys for services in connection with a land contract, the plaintiffs having ratified the settlement made by defendants, pursuant to which a warranty deed was given to the purchaser upon payment of the sum due, and the only question at issue being whether defendants' charges were unreasonable, it was not error to strike from the complaint an allegation that defendants had induced plaintiffs to sign the warranty deed when they thought they were signing a different instrument.

2. In an action involving only the question of the value of defendants' services as attorneys for the vendors in a land contract, it was not error to exclude a letter from the vendee's agent purporting to show that he was ready to pay the amount due, where such letter had not been brought to the attention of the defendants.
3. Upon the evidence in this case the trial court was justified in setting aside a verdict to the effect that $325 was an excessive charge for the services of attorneys in collecting $6,512.50 due on a land contract.

APPEAL from a judgment of the circuit court for Waukesha county: E. T. FAIRCHILD, Judge. *Affirmed.*

This is an appeal from a judgment dismissing the plaintiffs' complaint, and also from two intermediate orders, the first order striking out part of the plaintiffs' complaint and the second setting aside a general verdict of the jury.

The complaint alleges in substance that the defendants were employed as attorneys to foreclose a land contract and to recover back plaintiffs' farm freed from the lien of said contract and to take such proceedings as might be necessary to cancel and satisfy of record said land contract, and for such services plaintiffs agreed to pay defendants such sum as would fairly compensate them for their services and expenses; that plaintiffs relied upon defendants to take such action as would best subserve and protect their rights. The answer, among other things, alleges that the defendants were employed to foreclose the land contract and recover the plaintiffs' farm or to recover in full the amount due upon said land contract, and denies that plaintiffs employed defendants for any other purpose than to foreclose upon said land contract.

The defendants collected $6,512.50, and, after paying $1,050 incumbrances due on the property held under the land contract, deducted $325 for their services and $5.16 expenses incurred, and paid over to plaintiffs the balance, $5,132.34.

The appellants, claiming that the charges of the defendants for services were excessive, commenced an action to recover a portion thereof. The action was tried to the court

and a jury, and the jury returned a verdict in favor of the plaintiffs in the sum of $100. The court below set aside this verdict and dismissed the plaintiffs' complaint.

For the appellants there was a brief by *Tullar & Tullar* of Waukesha, and oral argument by *D. S. Tullar.*

For the respondents there was a brief by *Doe, Ballhorn & Doe* of Milwaukee, and oral argument by *Joseph B. Doe* and by *A. D. Shannon* of Oconomowoc, *in pro. per.*

KERWIN, J. 1. It is first insisted that the court erred in striking out the portion of the fourth paragraph of the complaint which alleges in substance that the defendants caused and procured the plaintiffs to execute and sign a document which plaintiffs were informed and believed was a necessary paper or document to be signed and executed by them in order to procure the release and satisfaction of the land contract, and that the same was executed by plaintiffs and delivered to defendants for no other purpose; "that, as said plaintiffs are now informed and believe, the paper or document so signed and executed by them as aforesaid was a warranty deed of their farm running to said Samuel Bowey." It is plain from the record that this deed was signed, executed, and delivered to Bowey upon payment by him of the amount due upon the land contract. This allegation was wholly immaterial in the instant case and there was no error in striking it out. The plaintiffs accepted the settlement made by the defendants, received the money, and ratified the execution of the deed. The allegation, therefore, had no relevancy to the defendants' claim to recover compensation for their services. The only question at issue in the case was whether the defendants charged more than was reasonable for their services.

2. Error is also assigned on the reception and exclusion of evidence. Upon the trial the court refused to admit a letter from one Henry Loibl, agent of Bowey, dated November 6,

1916, purporting to show that Bowey was ready to pay plaintiffs the amount due on their land contract. This letter was objected to, and objection sustained on the ground that it was not shown to have been brought to the attention of defendants. The court also refused to allow plaintiffs' original demand on defendants, written by plaintiffs, to be received in evidence. This demand was for an adjustment of the moneys held by the defendants. Also the overruling of an objection of counsel for plaintiffs to a hypothetical question put by counsel for defendants.

We find no prejudicial error under this head. Moreover the errors under assignments 1 and 2, before mentioned, do not seem to be relied upon by counsel for plaintiffs. They say in their brief, the "foregoing assignments of error numbered 1 and 2 are not presented or argued upon the theory of a mistrial nor for the purpose of a new trial of the action, but simply to show the trial court's misconception or misinterpretation of plaintiffs' cause of action, and which finally culminated in the order for and judgment setting aside the general verdict of the jury and for costs in favor of defendants."

3. The main question involved in this case comes under the third assignment, which raises the question whether the issues presented were for the jury, and whether the court below was justified in setting aside the verdict and dismissing the complaint.

It is contended on the part of the appellants that the court below erred in setting aside the verdict for the reason that there was ample evidence to support it; while on the part of the respondents it is insisted that upon the undisputed evidence they were entitled to the amount charged for services and disbursements, hence that no case was made by appellants for the recovery of any sum.

The evidence appears to be practically undisputed that the defendants performed the services they were employed to

perform and that the time spent in such performance at the regular fees for such services, according to the undisputed evidence, would entitle them to the sum of $325 for such services and $5.16 for expenses, making in all $330.16. True, most of the evidence on the part of defendants as to the value of their services was expert evidence, but it is substantially undisputed, and in view of the character of the case and the fact that the amount charged was not more than a reasonable collection fee for the amount collected and paid over to the plaintiffs we do not feel that we ought to disturb the finding of the court below, as we cannot say that it was clearly wrong. In making the order for judgment dismissing the complaint the court below said:

"The court having taken the matter under advisement and having fully considered the briefs submitted and examined the testimony taken upon the trial, and it appearing that the undisputed evidence of the witnesses upon both sides shows conclusively that the defendants made no excessive charge to plaintiffs, as alleged in the complaint, and that plaintiffs are not entitled to recover in this action, . . ."

We find no prejudicial error in the record and think the judgment should be affirmed.

By the Court.—The judgment is affirmed.

PROGRESS BLUE RIBBON FARMS, Appellant, vs. GEORGE and others, Respondents.

March 6—April 3, 1918.

Judgment against joint obligors when some are not served: Partnership: Pleading: Counterclaim by one partner on behalf of all: Appeal: Bill of exceptions.

1. Where plaintiff's cause of action was based on breaches by copartners of contracts signed by two of them, and judgment was demanded against all the copartners upon their joint partnership liability, such cause of action, if established, would have

entitled the plaintiff, although the summons was served upon a part only of the defendants, to a judgment under sec. 2884, Stats., against all of them which might be enforced against the joint property of all and the separate property of the defendant served.

2. One member of such copartnership might interpose a counterclaim on behalf of all; and where the allegations of a counterclaim by one of the defendants served, though not harmonious throughout, could not be interpreted otherwise than as applying only to partnership matters arising out of and connected with the transactions forming the basis of the complaint, such counterclaim must be deemed to be on behalf of the copartnership and all its members.
3. Where plaintiff's cause of action arises out of the joint obligation of members of a copartnership who contracted with him, and he had the right to judgment against all the members of the firm liable under the contracts, the defendants so jointly liable were entitled to counterclaim for any legal claims they had against plaintiff arising out of such contracts and connected with the subject of the action.
4. The fact that some of the partners had not been served with summons in the action did not defeat their right to have those who were served appear and secure judgment in favor of all members of the firm.
5. Where all the questions involved in an appeal appear from the record, a bill of exceptions is unnecessary.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This is an action by the plaintiff to recover from the defendants on alleged breaches of several contracts.

The plaintiff is a corporation organized and existing under the laws of the state of New Mexico and is authorized to do business in the state of Wisconsin, where it maintains a branch office. The defendants are alleged to be the members of a copartnership under the name of the Mississippi-Alabama Live Stock Association to carry on a live-stock business and to be engaged also in the buying and selling of farm lands. The plaintiff alleges that in May, 1913, it entered into four contracts with the defendants in regard to the delivery of several groups of horses to defendants to be bred,

trained, and cared for by defendants under certain conditions; that the terms of the contract were not complied with, which resulted in loss to it.

Neither the defendant *A. H. George* nor any of the other defendants appeared within the prescribed time to answer or demur to the complaint and an affidavit of nonappearance was filed by the plaintiff's attorneys for the purpose of obtaining judgment under the default, but the default was opened before judgment and the defendant *George* was granted leave to appear and answer in the action. After service of the summons *A. H. George* filed a petition with the clerk of the courts of Waukesha county for the removal of the cause to the district court of the United States for the Eastern division of the Southern district of Mississippi. The application was denied. The defendant *George* thereafter appeared in the action and served an answer wherein he counterclaimed for damages resulting from alleged breaches of the contracts with the plaintiff involved in the plaintiff's alleged cause of action.

The case was tried before the court and a jury. The jury found that the plaintiff was not entitled to recover upon its complaint and that the defendants were entitled to recover the sum of $9,852.45 upon the counterclaim. The plaintiff's motion for a new trial was denied and judgment was ordered in favor of the defendants for recovery from plaintiff of the damages awarded by the jury, with costs. The pleadings and other proceedings of the record in the case are so very voluminous that a restatement of them here is not practicable and a reference thereto as they appear in the record and printed case must suffice.

This is an appeal from the judgment entered in the case.

For the appellant there was a brief by *D. S. Tullar* of Waukesha and *Adolph Kanneberg* of Milwaukee, and oral argument by *Mr. Kanneberg.*

For the respondents there was a brief by *Holt & Coombs*

of Waukesha, attorneys, and *Bloodgood, Kemper & Bloodgood* and *Emmet Horan, Jr.*, of Milwaukee, of counsel, and oral argument by *Mr. Horan* and *Mr. Albert N. Coombs.*

SIEBECKER, J. There is no dispute but that the plaintiff's cause of action is predicated on breaches of the contracts it made with the defendants *A. H. George* and *R. M. Striplin* as copartners doing business under the firm name of the Mississippi-Alabama Live Stock Association, located at Meridian, Mississippi. It appears that *A. H. George* was served with summons in this action and that *A. H. Bartelt* was by agreement of the parties appointed agent of *Striplin* and *George* for the service of legal process in litigation arising out of the contracts made between the parties. An examination of plaintiff's complaint discloses that its alleged claims for a recovery are based on the alleged defaults of the members of this copartnership to perform the four contracts attached to the complaint as Exhibits A, B, C, and D, and that it demands judgment against the two copartners, *George* and *Striplin,* who signed the contracts, and the other defendants as members of such copartnership upon their joint copartnership liability. These facts appeared without dispute and entitled plaintiff to recover judgment if it established the causes of action set forth in its complaint against the copartners on their joint liability under the contracts in question. *Brawley v. Mitchell,* 92 Wis. 671, 66 N. W. 799; sec. 2884, Stats. The circuit court correctly held that plaintiff's cause of action, if established upon the trial, would have entitled plaintiff to judgment against all the defendants upon their alleged joint partnership liability.

It is contended by the plaintiff that the court erred in awarding judgment in favor of the defendants on the counterclaim interposed by the defendant *George.* This claim is made on the ground that this defendant's answer is not made in behalf of the copartnership and the other members of the

firm, but that it shows on its face and in substance that it is the individual answer of the defendant *George*.

The phraseology of the allegations is not harmonious throughout the pleading; parts of it speak in terms of the answering defendant individually and other parts in terms referable only to the partnership transactions. But the substance and content of all the allegations of the answer which admit, deny, or otherwise specifically answer the allegations of the complaint admit of but one interpretation, namely, that the answer embraces only copartnership matters which arise out of and are connected with the transactions included in plaintiff's complaint. The same is true of the matters alleged in the counterclaim. It is manifest from the facts and circumstances alleged in the pleadings in the action that the issues involved included nothing aside from the transactions arising out of and relating to the matters embraced in the four contracts entered into between plaintiff and *George* and *Striplin* as a copartnership doing business as the Mississippi-Alabama Live Stock Association. The answer of the defendant *George* must be interpreted in the light of these facts and circumstances and the alleged relationship of the parties. Viewing the answer and counterclaim in such light, it is manifest that they are interposed in behalf of the copartnership and all of the members thereof as well as in behalf of the answering defendant. The right of defendant *George* to answer and counterclaim in behalf of the firm and his copartners and himself is recognized in *Elliott v. Espenhain,* 54 Wis. 231, 11 N. W. 513.

The plaintiff's cause of action arises out of the joint obligation of the members of the copartnership who contracted with plaintiff, and the counterclaim is founded on the very consideration upon which plaintiff rests its claim, and hence of necessity arises out of the contract and transaction connected therewith. Since the plaintiff had the right to judgment against all the members of the firm liable under the con-

tracts, it follows that the defendants so jointly liable to plaintiff were entitled to counterclaim for any legal claims they had against plaintiff arising out of such contracts and connected with the subject of the action. The claim that none of the defendants except *George* and *Striplin* can be held to have been served with summons and hence are not properly parties before the court, does not defeat their right as members of the copartnership to have *George* and *Striplin* appear for them and defend and to secure judgment in favor of all the members of the firm. The court had jurisdiction of the subject matter of the action and of all the parties properly before it by virtue of the proceeding upon the record. It is considered that the court properly awarded judgment in defendants' favor upon the alleged counterclaim and the verdict of the jury. All questions involved in this appeal appear from the record and hence there is no necessity for a bill of exceptions in the case, and appellant's application for a stay of proceedings must be denied.

By the Court.—The judgment is affirmed.

APFELBACHER, Respondent, vs. THE STATE and others, Appellants.

March 7—April 3, 1918.

States: Immunity to suit: Waiver: Water and water courses: Prescriptive rights: Pleading: Amendment to conform to proof: Riparian rights: Mills and milldams: Withholding and storing water: Reasonable use: Finding of fact: Grant of rights to state.

1. Ch. 624, Laws 1913, authorizing this plaintiff to bring suit against the state, did not create or admit any liability on the part of the state, but merely waived its immunity from being sued by one of its citizens.
2. The claim of a lower mill owner to prescriptive rights in the use of the waters of a stream is *held* not well founded as against the older rights of an upper mill owner.

3. Although plaintiff's claim was based upon alleged prescriptive rights in the use of the waters of a stream, the court might properly grant relief upon the basis of rights which he had as a riparian owner merely, the complaint being considered as amended to conform with the evidence properly before the court.
4. The owner of an upper dam has the right to withhold and store up the waters of the stream at certain periods in order that he may more properly and efficiently carry out the purpose to which he, as riparian owner, may put such waters; but this right, like all other rights which a riparian owner, as such, acquires to the waters of the stream, is restricted always to a reasonable detention or a reasonable use measured and determined with reference to the capacity of the stream, the uses to which it is and has been put, and the rights of other riparian owners.
5. In an action by a lower mill owner against the state and the owner of an upper dam at the outlet of a lake, a finding by the court that the withholding by the state at times, under a contract with said upper owner, of the flow of water from the lake into the stream was not a reasonable or necessary use of the waters for the proper carrying on of a fish hatchery, is not a mere conclusion of law but a finding of the ultimate fact upon which a determination of the rights of the parties must be based.
6. The state cannot acquire from a riparian owner by contract a greater right as to the withholding of the waters of a stream than such owner had, or use such right in a way which would be unreasonable if the use were by said owner.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The appeal is from a judgment granting plaintiff certain equitable relief.

The appeal in this case (no bill of exceptions being before us in the record) presents only the pleadings, findings, and judgment for review. From these findings it appears:

That the defendant *Humphrey* and his predecessors have for many years operated a grist-mill at the outlet of Lake Nagawicka in Waukesha county. Lake Nagawicka has an area of 1.41 square miles and its waters are held and maintained, to a certain extent, by a dam owned and controlled by

defendant *Humphrey* at this outlet. The stream forming the inlet and outlet to this lake is Bark river. One mile below Lake Nagawicka and on Bark river plaintiff and his predecessors had for many years also maintained a dam and operated a similar mill. The mill-pond at this point was about twenty-five acres in extent and held only sufficient water supply to run plaintiff's mill for a few hours. The mill and water power of defendant *Humphrey* was the elder of the two.

That in 1906 the *State of Wisconsin* established a fish hatchery just below Nagawicka lake with ponds numbered 1, 2, and 3, just below the lake and on the north side of the Bark river, and ponds numbered 4, 5, and 6 south thereof. Ponds 1, 2, and 3 were supplied with water from a spillway on Lake Nagawicka; ponds 4, 5, and 6 by a twelve-inch pipe running from the waters of Lake Nagawicka through or under ponds 1, 2, and 3 and the Bark river. The waters from these six ponds, save such as is lost by seepage or evaporation, ultimately find their way into Bark river above the plaintiff's dam. The total fall between the two dams is ten and one-half feet.

That for upwards of twenty years prior to 1906, as the two water powers were being operated by their respective owners, and with the natural flow of the Bark river between them, the upper mill had been operated practically every day continuously and the plaintiff was thereby enabled to also operate his mill continuously.

That by a written contract made in 1906 between the defendant *Humphrey* and the *State of Wisconsin* it was agreed that the *State* might place and maintain in Lake Nagawicka for the purpose of drawing water for use in the fish hatchery the twelve-inch pipe connected with the ponds numbered 4, 5, and 6, and might use for the hatchery so much of the waters of Lake Nagawicka as could be drawn through such pipe, and that if at any time such use by the *State* and by defend-

ant *Humphrey* in connection with his mill should lower the waters in the lake to a point twelve inches below a certain high-water mark, then the said *Humphrey,* his heirs and assigns, would absolutely desist and refrain from using any water from said lake for the running of the mill property or for any other purpose until the waters of said lake should again reach a point within twelve inches below such high-water mark.

That the defendant *State,* by reason of such agreement, claimed to have the right to and did exercise practical control over the waters at said dam and did at several times subsequent to 1906 shut off the outflow of the waters in Lake Nagawicka so that for periods of one or two weeks each the plaintiff was practically deprived of the use of the waters of Bark river and forced thereby to shut down his mill. That the natural flow of water from Lake Nagawicka into Bark river and from thence on into Upper Nemahbin lake is sufficient to operate the two mills in question, and that each of such mills is reasonably adapted to such watercourse, and the ordinary operation of the fish hatchery maintained by the *State of Wisconsin* is also a reasonable use of the natural flow of Bark river. That it is not necessary for the maintenance of the fish hatchery and its efficient operation that the defendant *State of Wisconsin* should avail itself of the attempted grant of power under the agreement between itself and the defendant *Humphrey,* and that the exercise of such attempted grant of power on its part is to impair the power and destroy the use of the mill of plaintiff in dry or low-water seasons. The operation of plaintiff's mill prior to the agreement between defendants in 1906 was of substantial value to him, but by the exercise by the *State* of such claim of right under the agreement there has been a substantial interference with, if not destruction of, the plaintiff's business.

That the mill of the defendant *Humphrey* may be efficiently operated, although not to its full capacity, when the

waters of Lake Nagawicka are down as low as a point fifteen inches below such high-water mark. By lowering the water in Lake Nagawicka proportionally more and more water is needed to generate the same amount of power in *Humphrey's* mill, and that therefore, as riparian owner, defendant *Humphrey* has the optional right, when the water in the mill-pond is as low as twelve inches below high-water mark, to either close his mill so that more water and power may be accumulated or to run his mill under low-water pressure.

As conclusions of law the court found that the defendant *State of Wisconsin* has made an unreasonable use of the waters of Lake Nagawicka and Bark river and that both defendant *State* and the defendant *Humphrey* should be restrained from exercising or attempting to exercise the power attempted to be given under the agreement between them so far as it affected the detaining of the water from Bark river in such manner as theretofore done under such claim of right and except only when such detention is a reasonable one having relation to the correlative rights and duties existing between the plaintiff and the defendant *Humphrey* as riparian owners. From such judgment the defendants appeal.

For the appellants there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general (attorneys for all appellants except *Ephraim Humphrey*), and by *J. E. Thomas* of Waukesha, attorney for the appellant *Humphrey;* and the cause was argued orally by *Mr. Messerschmidt* and *Mr. Thomas.*

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Albert K. Stebbins,* of counsel, all of Milwaukee, and oral argument by *Mr. Stebbins.*

ESCHWEILER, J. By ch. 624 of the Laws of 1913 the legislature expressly gave plaintiff authority to bring suit for the purpose of settling and determining all controversies be-

tween him and the *State of Wisconsin* with reference to this mill property on the Bark river and relative to the use of the waters of Bark river and Lake Nagawicka. The only effect of this legislation was to waive the immunity, which the *State* as sovereign has, from being sued by one of its subjects, and it neither created nor admitted any liability on the part of the *State*. *Apfelbacher v. State,* 160 Wis. 565, 152 N. W. 144.

In plaintiff's complaint he asserted that he had acquired certain rights by prescription against the defendant *Humphrey* in and to the water power in question. The determination of the court upon the evidence was, however, that the rights of the defendant *Humphrey* were older than those of the plaintiff. This took any question as to prescriptive rights out of the case.

Defendants contend that, the plaintiff having come into court upon allegations based upon a theory that his rights were prescriptive, the court could not consistently in this case grant him relief upon the basis of rights which he had as a riparian owner merely. The court, however, was fully justified in disposing of the case upon the evidence that was before it and in adjusting the rights of the parties in accordance therewith rather than upon any narrow construction of the pleadings. Under legislative and oft-repeated judicial declarations such pleadings as herein are to be considered as amended to conform with the evidence properly before the court.

In this state the owner of an upper dam has the right to withhold the waters of the stream at certain periods in order that there may be thereby created a sufficient storage of water to more properly and efficiently carry out the purpose to which he, as riparian owner, may put the waters of the stream. *Mabie v. Matteson,* 17 Wis. 1; *Timm v. Bear,* 29 Wis. 254; *Coldwell v. Sanderson,* 69 Wis. 52, 28 N. W. 232, 33 N. W. 591; *Lawrence v. American W. P. Co.* 144 Wis. 556, 563, 128 N. W. 440.

But the right to detain for a time, as well as every other right which a riparian owner acquires, as such, to the waters of the stream flowing through or by his land, is restricted always to that which is a reasonable detention or a reasonable use, and these terms are to be measured and determined by the extent and capacity of the stream, the uses to which it is and has been put, and the rights that other riparian owners on the same stream also have. There can be no absolute or fixed standard for the measure of such relative rights. The essential question to be determined by the court or jury trying the issues between the parties in each particular case is what is reasonable under the circumstances there presented. This was the view adopted by the trial court, and his finding, therefore, that the withholding, by the *State,* at times of the flow of water from Lake Nagawicka was not a reasonable or necessary use of the waters of Lake Nagawicka and the Bark river for the proper carrying on of the fish hatchery, is the controlling fact in this case. This determination by the court is not, as contended by defendants, a mere conclusion of law, but is the ultimate fact necessary to be determined before the court can properly arrive at conclusions of law from which a judgment may follow fixing the rights of the parties. This is none the less an issuable fact because it may and does require the consideration and consolidation of a number of other facts presented in evidence. The defendants and this court are bound by such finding, and with that fixed in the case there is no escape from the judgment as entered by the court below.

The right that defendant *Humphrey* has to hold back the waters of Lake Nagawicka for a time when below the high-water mark, so that the supply of water may thereby be increased, is one that is necessarily also within the limitation prescribed for all riparian rights of being kept within the boundaries of what is reasonable, and it cannot be severed from his entire rights as riparian owner, so that this par-

ticular element of those rights, that is, to withhold the natural flow of the Bark river, can be, in a measure, carved out therefrom and transferred to someone else and by that person used in a manner that would be unreasonable if the use were by *Humphrey* himself. The conveyance by *Humphrey* to the *State* confers no greater right with reference to these flowing waters than *Humphrey* himself had. The condition of reasonable use attached to it before he conveyed it and remained with it after such conveyance. The *State* stands in no better position with reference to its exercise than did or would the defendant *Humphrey*.

By the Court.—The judgment of the circuit court is affirmed.

OWEN, J., took no part.

ROWELL, by guardian *ad litem*, Respondent, vs. WOMEN'S CATHOLIC ORDER OF FORESTERS, Appellant.

March 7—April 3, 1918.

Life insurance: Mutual benefit association: Warranty in application: Falsity: Evidence.

In an action upon a policy or certificate of life insurance issued by a mutual benefit association, the evidence is *held* to show conclusively, contrary to a finding by the jury, that the assured did not fully and truthfully answer the question, in her application, as to when and for what she had sought the advice of a physician or surgeon during the three years prior to making such application.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

The defendant is a mutual benefit association or fraternal order incorporated under the laws of the state of Illinois and duly licensed to do business in the state of Wisconsin. On

the 3d day of August, 1914, at Beaver Dam, Wisconsin, Kate Marsch made application for admission into said order, and in and as a part of her application warranted, among other things, that she never had, nor had ever received treatment for, rheumatism, eruptions of the skin, or swelling of feet, hands, or eyelids. Her application contained this question: When and for what has the advice of a physician or surgeon been sought within the last three years? Her answer was: "La grippe—one year ago." Upon such application she was received into the order, and on the 5th day of August, 1915, a policy or certificate of insurance upon her life was issued to her by the defendant for $1,000, payable upon her death to *Caroline E. Rowell,* the plaintiff herein. Kate Marsch died on the 15th day of January, 1915. This action was brought to recover on said policy of insurance. Judgment was rendered in plaintiff's favor upon a special verdict of a jury, and from such judgment defendant appealed.

For the appellant there was a brief by *Hennessey, Hennessey & O'Boyle*, attorneys, and *Vincent D. Hennessey,* of counsel, all of Milwaukee, and oral argument by *Vincent D. Hennessey.*

For the respondent the cause was submitted on the brief of *Chas. C. Miller* and *James F. Malone* of Beaver Dam.

Owen, J. The questions litigated in the court below were whether Kate Marsch correctly warranted in her application that she had never had rheumatism, eruptions of the skin, and swelling of the feet; also whether she correctly answered the question in her application, "When and for what has the advice of a physician or surgeon been sought within the last three years?" her answer thereto being "La grippe—one year ago." The defendant introduced evidence tending to prove that her warranties upon these questions were false. The evidence offered by the defendant was in no manner re-

butted by the plaintiff. The evidence might well support findings to the effect that Kate Marsch had had rheumatism and eruptions of the skin. The jury by its verdict, however, found that she had had neither. We do not intimate whether their findings upon these questions are supported by the evidence, for the reason that, whatever doubt there may be upon these questions, there can be no doubt that their verdict upon another material question is wholly unsupported by evidence or by any conceivable reason or circumstance in the case.

The thirteenth question of the special verdict was this: "Did Kate Marsch make a full and fair disclosure of the facts inquired about in her answer to this question: 'When and for what has the advice of a physician or surgeon been sought within the last three years?' " It will be remembered that her answer to this question given in her application was, "La grippe—one year ago." The jury answered this question Yes.

Here is the testimony bearing upon that subject: Dr. Schoen testified that he was a physician and surgeon practicing in the city of Beaver Dam. In the course of his practice, within three years prior to August 3, 1914, he was consulted professionally by Kate Marsch perhaps two or three, may be five or six, times at the city of Beaver Dam. Dr. Sears testified that he was a practicing physician at Beaver Dam. Within three years prior to August 3, 1914, he was consulted professionally by Kate Marsch sixteen times between December 13, 1912, and January 10, 1913, and he made charges for those consultations. Dr. Appleton testified that he was a practicing physician at Beaver Dam and that he was consulted by Kate Marsch professionally, being called to her home, on June 28 and 29, 1914. Dr. Roseletta Bird testified that she was a resident of Beaver Dam, where she practiced medicine. Kate Marsch consulted her once within three years previous to August 3, 1914, and that consultation was had somewhere in the last of June or the first of

July, 1914. Dr. Schwalbach testified that he was a resident of Juneau and a practicing physician and surgeon; that he knew Kate Marsch in her lifetime; that he was consulted by her professionally within three years prior to August 3, 1914. At that time William Volkmann, brother-in-law of Kate Marsch, was the sheriff at the Dodge county jail. The doctor's best recollection was that he called on Kate Marsch six times at the Dodge county jail and once she called on him at his office. These calls were all within a month—in about April, 1912.

If the testimony of these physicians be true, Kate Marsch did not fully and truthfully answer the question as to when or for what she had sought the advice of a physician or surgeon within the last three years previous to the making of the application. There is nothing in the record to cast the least suspicion upon the testimony of these physicians. In fact, the truthfulness of their testimony is not challenged by the respondent. She seems to rely upon the proposition that such evidence does not amount to proof of the falsity of Kate Marsch's answer to the question.

Each of these physicians was permitted to testify that he had been consulted professionally by Kate Marsch. Substantially the following question was then propounded to each: "What is the fact as to whether or not at any time you consulted Kate Marsch or Kate Marsch consulted you, professionally, you prescribed for her?" This question was objected to and the objection was sustained by the court. Appellant's attorneys seem to think the answer to this question was material to appellant's case, and respondent's attorneys seem to rely upon an absence of proof because answers in response to this question were not permitted. We do not see that answers to these questions would have added anything to the testimony already in. The question was, "When and for what had the *advice* of a physician or surgeon been sought in the last three years?"—not whether they had prescribed for her.

In her application Kate Marsch warranted that the only time that the advice of a physician or surgeon had been sought by her within the last three years was "one year ago—for la grippe." From the testimony of the physicians it conclusively appears that the advice of five physicians had been sought upon numerous occasions. In view of this testimony how can it be said, as the jury did say in its special verdict, that Kate Marsch made a full and fair disclosure of the facts inquired about by her answer to this question? The answer of the jury to the thirteenth question has nothing whatever to support it. It should have been No; and the trial court should have granted the motion of the defendant to change the answer to that question from "Yes" to "No," and rendered judgment in favor of the defendant.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment dismissing the complaint.

DOUGLAS, Respondent, vs. VORPAHL, Appellant.

March 7—April 3, 1918.

Vendor and purchaser: Statute of frauds: Memorandum of contract: Sufficiency: Time of payment: Description of land.

1. A written memorandum acknowledging receipt from C. V. of $15, "as part payment of $2,400, when warranty deed and abstract is given to" real property described, and signed by the owner's authorized agent, is a sufficient contract for the sale of land, under sec. 2304, Stats. No time of payment being specified, the payment is to be cash on delivery of the deed and abstract showing good title, a reasonable time being allowed for examination of the abstract.
2. The description in a contract for the sale of land is sufficient if, with the aid of the surrounding circumstances, it can be determined with reasonable certainty what land was intended; and that is a matter to be determined by the evidence on the trial, not upon a demurrer to the complaint setting out the contract.

APPEAL from an order of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a general demurrer to the complaint. The action is brought by the vendor to obtain specific performance of a contract for the sale of land, and the complaint sets forth the making by the parties of an agreement evidenced by the following written memorandum or contract:

"Green Bay, Wisconsin, July 21, 1916, received of *Charles Vorpahl* $15, as part payment of (2,400) twenty-four hundred dollars, when warranty deed and abstract is given to lots number one and two, in Cady and Warren subdivision to the city of Green Bay, Wisconsin.

"O. J. DOUGLAS,
"Per J. L. Wilcox, Agent."

The question presented on appeal is whether this memorandum or contract is sufficient to satisfy sec. 2304, Stats., which requires every such contract "or some note or memorandum thereof, expressing the consideration," to be in writing and subscribed by the vendor or his authorized agent.

For the appellant the cause was submitted on the briefs of *Bruemmer & Bruemmer* of Kewaunee.

For the respondent there was a brief by *Kaftan & Reynolds* of Green Bay, and the cause was argued orally by *Robert A. Kaftan.*

WINSLOW, C. J. Under the decisions of this court the memorandum was clearly sufficient to satisfy the terms of sec. 2304, Stats. It was in writing, was subscribed by the vendor's authorized agent, expressed the consideration, described the property, and was sufficiently definite in its terms so that it can be readily gathered therefrom that it was the intention of the plaintiff to convey and of the defendant to purchase. No time of payment was specified, but this simply means that the payment is to be cash on the delivery of the deed and abstract showing good title, a reasonable time be-

ing allowed for examination of the abstract. *Schweitzer v. Connor,* 57 Wis. 177, 14 N. W. 922; *Van Doren v. Roepke,* 107 Wis. 535, 83 N. W. 754; *Cliver v. Heil,* 95 Wis. 364, 70 N. W. 346; *Williamson v. Neeves,* 94 Wis. 656, 69 N. W. 806; *Sizer v. Clark,* 116 Wis. 534, 93 N. W. 539.

It is admitted by the complaint that the description is defective because it does not name the block and because there are two Warren subdivisions in the city. However, the principle is familiar that if the contract refers to the land in such terms that by the aid of the surrounding circumstances at the time the court can with reasonable certainty determine what land is intended, it will be sufficient. *Wis. Cent. R. Co. v. Schug,* 155 Wis. 563, 145 N. W. 177. This is a matter to be determined by the evidence on the trial, not by demurrer.

By the Court.—Order affirmed.

WILL OF HAGEMEISTER: HAGEMEISTER and another, Appellants, vs. HAGEMEISTER and another, by guardian *ad litem,* Respondents.

March 7—April 3, 1918.

Wills: Provision for widow: Interest in annuity: Election not to take under the will.

After certain specific bequests and after devising to the widow the homestead for life and giving to her the household furniture, a will gave the residue of the testator's estate in trust, providing that during her widowhood and until both of the two sons should arrive at the age of twenty-five years the trustees should pay to the widow $5,000 annually "for the support, care, nurture, and education of my said sons under twenty-five years of age;" that one fourth of the remainder of the estate as it should then exist should be delivered to each of the sons when he became twenty-five years old; that when the younger son reached that age, and until she should die or remarry, the trustees should pay to the widow $3,000 annually; that if the widow should re-

marry "the annuities hereinbefore provided for her shall then cease and no longer be paid to her," and the trustees should provide suitable support, maintenance, and education for the sons until they became twenty-five years old, and pay to the widow, upon her remarriage, $10,000. The widow elected not to take under the will. *Held*, that it was the testator's intention to give to the widow, as a part of the provision made for her, a beneficial interest to the extent of $3,000 each year in the $5,000 which was to be paid to her annually until both sons reached the age of twenty-five years; that such interest ceased when she renounced the provision made for her in the will; and that the amount to be paid to her annually thereafter for the care and education of the sons is $2,000.

APPEALS from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

The appeals are from a judgment of the circuit court reversing the judgment of the county court of Brown county construing certain provisions of the last will and testament of Henry F. Hagemeister, deceased.

Henry F. Hagemeister died at the city of Green Bay on June 27, 1915. He made the following gifts by his will:

By paragraph 1 he gives to a cousin, George Martin of Sturgeon Bay, $5,000.

By paragraph 2 he gives to a nephew, Gustav A. Walter of Green Bay, $5,000.

In paragraphs 3 and 4 he names *Carlton Merrill* and Gustav A. Walter executors and trustees of the estate, with provision that each be paid $1,000 a year as long as each acts in that capacity.

By paragraph 5 he leaves the homestead to the widow, *Josephine Hagemeister,* for life, and after her death to her daughter, Helen Hagemeister.

By paragraph 6 he gives to the widow's daughter, Helen Hagemeister, the sum of $10,000.

By paragraph 7 he gives to a son, Henry Hagemeister, his Masonic ring and diamond stud, and in paragraph 8 a watch to a son, Karl Hagemeister.

In paragraph 9 he gives all the household furnishings, wearing apparel, and ornaments to the widow, *Josephine Hagemeister.*

By paragraph 10 he disposes of the residue of the estate in trust for the following uses and purposes:

Subdivision 1 provides that during her widowhood and until the two minor sons arrive at the age of twenty-five years, the trustees shall pay to the widow, *Josephine Hagemeister,* the sum of $5,000 annually for support, care, and education of the sons under twenty-five years of age.

Subdivision 2 of paragraph 10 provides that when Henry F. Hagemeister, Jr., arrives at the age of twenty-five years the trustees shall deliver to him one fourth of the remainder of the estate as it then exists.

Subdivision 3, paragraph 10, provides that when Karl Hagemeister arrives at the age of twenty-five years he shall receive one fourth of the estate as it then exists.

Subdivision 4, paragraph 10, provides that when the son Karl Hagemeister arrives at the age of twenty-five years the trustees shall pay annually to the widow the sum of $3,000.

Subdivision 5, paragraph 10, provides that upon the death or remarriage of the wife, *Josephine Hagemeister,* the remainder of the estate shall be divided equally between the two sons, share and share alike, the same to be paid and delivered to them respectively upon the happening of either of said events, if he is over thirty-five years of age; if not of that age, then that the share of each, and increase, shall be paid to him when he arrives at the age of thirty-five years.

Subdivision 6, paragraph 10, follows:

"In case my wife, *Josephine,* remarries, the annuities hereinbefore provided for her shall then cease and be no longer paid to her, and my said trustees shall provide suitable support, maintenance, and education for my said sons until they respectively arrive at the age of twenty-five years, and there shall be paid to my said wife upon her remarriage the sum of $10,000."

Subdivision 7, paragraph 10, provides that should the wife elect to take under the law and not under the will, all gifts and bequests made to Helen Hagemeister, her daughter, shall thereupon be revoked and the same shall revert to the estate.

The remaining subdivisions of paragraph 10 have no bearing on this controversy.

Paragraph 11 appoints Gustav A. Walter and *Carlton Merrill* executors, with the provision that each give a surety bond of $25,000, the expense thereof to be paid out of the estate.

This will was admitted to probate. The widow, *Josephine Hagemeister,* elected to take her share of the estate as provided by statute, renouncing the provisions made for her in the will. The trustees then petitioned the county court to construe the will with especial reference as to whether or not the will makes any provision for payment to *Josephine Hagemeister* of sums for the support of the children in case she decided not to take under the will.

The county court found that it was the intention of the testator that in case *Josephine Hagemeister* decided not to take under the will the $5,000 was to be paid to her each year for the support and education of the two minor sons until such time as they should, respectively, arrive at the age of twenty-five years.

W. L. Evans, guardian *ad litem* of the minor sons, appealed from such judgment to the circuit court. A separate appeal was taken by *Carlton Merrill,* one of the executors.

The circuit court found that it was the intention of the testator, in case *Josephine Hagemeister* as widow elected to take her share of the estate provided for her by law in place of the provisions of the will, that she be paid the sum of $2,000 annually for the care and education of the two minor sons until they reach, respectively, the age of twenty-five years, and awarded judgment accordingly.

From such judgment *Josephine Hagemeister* and *Carlton Merrill,* an executor, separately appeal. The widow claims that, notwithstanding her election not to take under the will, she is entitled to receive the whole of the $5,000 annually for the support and education of the sons until they attain the age of twenty-five; while the executor contends that, because of such election, the widow should receive no part of said annuity.

For the appellant *Josephine Hagemeister* there was a brief by *Bouck, Hilton, Kluwin & Dempsey* of Oshkosh, and oral argument by *E. J. Dempsey.*

For the respondent *Carlton Merrill,* executor, there was a brief by *Silverwood & Fontaine* of Green Bay, and oral argument by *T. P. Silverwood.*

W. L. Evans of Green Bay, guardian *ad litem,* for the respondents.

SIEBECKER, J. The questions raised on these appeals present the inquiry: What provisions, if any, did the testator intend to make for the support of his widow and the two minor sons from the date of his death to the time his younger son arrived at the age of twenty-five years? By the fifth paragraph of his will he devises to his widow the homestead during her life, and by the ninth paragraph he bequeaths to her all the household furniture, furnishings, wearing apparel, and ornaments, except the few articles specifically given to his sons. After making the specific bequest referred to in the foregoing statement, testator, by the tenth paragraph of his will, gives, devises, and bequeaths all the residue and remainder of his estate to two trustees in trust for the uses and purposes as therein specifically designated and provided. Subdivision 1 of the tenth paragraph reads:

"During her widowhood (*i. e.* in case she is not remarried) and until both of my said sons, Henry F. Hagemeister, Jr., and Karl Hagemeister, shall arrive at the age of twenty-

five years, my said trustees shall pay to my wife, *Josephine Hagemeister,* annually in equal monthly instalments, the sum of five thousand dollars ($5,000) for the support, care, nurture, and education of my said sons under twenty-five years of age."

And subdivision 4 of the tenth paragraph reads:

"After my said son, Karl Hagemeister, arrives at the age of twenty-five years, and until she dies or remarries, my said trustees shall pay to my wife, *Josephine Hagemeister,* annually in equal monthly instalments, the sum of $3,000."

By subdivision 6 of the tenth paragraph it is provided that if the widow remarries, "the annuities hereinbefore provided for her shall then cease" and the trustees are to provide suitable support, maintenance, and education for the sons up to their twenty-fifth year, "and there shall be paid to my said wife upon her remarriage the sum of ten thousand dollars ($10,000)." The will provides for the distribution of the trust estate at the termination of the trusts.

The claims of the respective parties interested in this proceeding are in conflict as to the meaning of subdivision 1 of the tenth paragraph. The widow asserts that the testator intended that she should receive $5,000 annually for the sole benefit of the two minor sons to provide for their support, care, nurture, and education. The executor contends that the testator intended thereby to give to the widow individually the specific sum annually and charged her with the support and education of the sons up to their twenty-fifth years respectively, and that this bequest ceased when she renounced the provisions of the will and she is not entitled to have paid to her any part thereof. The guardian *ad litem* insists that this bequest of $5,000 is a gift to the widow in common with the minor sons for their support and maintenance and education, and since the widow has elected to renounce the provisions made for her by will she can be paid only the amount that the two sons are annually entitled to receive during the limited period. The language of this provision is ambigu-

ous and we must look to the contents of the will and the facts and circumstances surrounding testator when he made it to ascertain his intent.

It appears reasonably certain that testator had in mind that his widow and his two minor sons would reside in the homestead of the family and that the sons should receive the care, nurture, and watchful attention of their mother. The evidence discloses that the family, during the testator's life, lived in a provident way and probably did not expend annually a sum exceeding $5,000 for their support and maintenance, including that of the testator. There is no other provision made in the will for the widow's support during the period testator charged her to care for, support, and educate the sons. After the younger son attains the age of twenty-five years the widow is given $3,000 annually for her individual support. In a clause following these provisions of the will dealing with the support and maintenance of the testator's family he declares: "In case my wife, *Josephine,* remarries, the *annuities hereinbefore* provided for *her* shall then cease and be no longer paid to her," and he provides that then the "trustees shall provide suitable support, maintenance, and education for my said sons." It is manifest from these provisions that testator omitted to provide for the widow's support out of the estate until the younger son arrives at the age of twenty-five years unless he intended to provide for her out of the $5,000 bequest above specified. Such a result seems contrary to the manifest purposes and objects the testator had in mind in providing for the care and maintenance of his family. In this connection it is very significant that he gave his widow individually $3,000 annually for her support when the $5,000 payment to her should cease. In another paragraph he declares that in case she remarries, "the *annuities hereinbefore* provided for *her*" shall cease and be no longer paid to her. The words "annuities *hereinbefore* provided for her" can have no applica-

tion other than to the $5,000 and the $3,000 which he gives her upon conditions stated. The provisions of the will, in connection with the facts and circumstances under which testator acted in disposing of his estate and bestowing his bounty, indicate that he expected his widow and children to continue to live together in the family homestead after his death until the younger son arrived at the age of twenty-five years as they had lived theretofore. The fact that he provided that the $5,000 bequest should be paid to his widow for four years after the older son ceased to have a claim thereto for his support and maintenance, in connection with the provision that she was not to receive the $3,000 provision for her support until this four-year period expired, is compelling and persuasive corroboration as tending to show that the testator intended that the $5,000 annual payment to the widow for the period fixed by him should be for the support of herself and the two sons, and that he had no intention of providing $5,000 annually for the individual support of the widow or of the two sons. We are led to the conclusion that testator intended to give the widow a beneficial interest in the $5,000 annual payment that he directed his trustees to pay her out of his estate until the younger son arrives at the age of twenty-five years.

By subdivision 7 of paragraph 10 of the will testator provides that if his widow rejects the provision made for her in his will by electing to take under the law, the devises and bequests to her daughter Helen under the will are revoked and become part of the residue of the estate. This is in itself not persuasive as showing that testator intended, if she so elected to renounce the provisions made for her in his will, that she should thereafter receive the $5,000 annually for the support of herself and sons for the period specified and the $3,000 annually thereafter until she died or remarried. We discover nothing in this or any other provision of the will indicating such an intent, and the plain implication is

that he considered the life estate given her in their home and the annuities to be paid to her during her widowhood to be a just and equitable provision to cover her widow's interest in his estate under his disposition of the estate. In the light of this thought in his mind there is no ground for saying that he intended she should receive these bounties should she elect to claim the share of his estate provided by law as his widow. It is considered that it does not "plainly appear by will" that he intended to give her these bequests if she elected to take a widow's share of testator's estate.

We are of the opinion that the circuit court correctly held that testator's widow was given a beneficial interest in the $5,000 provision made in subdivision 1 of paragraph 10 of the will; that since she elected to claim her widow's share of his estate provided by law she is not entitled to the provision made for her in the will; that the beneficial interests of the widow and the two sons in the $5,000 annuity under the will is a common interest, and that her interest ceased when she renounced the provision made for her in the will.

The question remains, What was the amount of her interest in this annuity? It is manifest from the will that the testator intended this bequest as a proper and suitable support of his widow and the two sons respectively up to their twenty-fifth year and that she was to have the right of supervisionship as to its expenditure for the purposes indicated. The provision directing that she should receive $3,000 annually thereafter is a clear indication that he considered this a proper sum for her support as his widow. In view of this there can be little room for speculation but that he intended she should have the sum of $3,000 out of the $5,000 bequest for the support of herself and sons.

We are persuaded that the decision of the circuit court holding that the sons' interest in this bequest is $2,000 annually and that the widow by renouncing the will lost her right to the remaining $3,000, is correct and must stand.

By the Court.—The judgment is affirmed. The guardian *ad litem* is allowed the sum of $390.60 for his services, disbursements, and expenses in this court.

MARTIN, Appellant, vs. MARTIN, Respondent.

March 7—April 3, 1918.

Divorce: Division of property: Estate of wife "derived from the husband:" Agreement between husband and wife: Validity: Public policy: Awarding property to wife charged with payment to husband.

1. The subject of divorce and distribution of property in divorce proceedings is regulated by statute in this state, and the distribution in any particular case must be one authorized by the statute.
2. The theory of our divorce statutes is to provide for an equitable division of the property of the parties, including such property of the wife as shall have been derived, either mediately or immediately, from the husband.
3. Money and labor put by the husband into the wife's property, greatly enhancing the value of her estate, constitute estate "derived from the husband," within the meaning of sec. 2364, Stats. *Martin v. Remington*, 100 Wis. 540; *Frackelton v. Frackelton*, 103 Wis. 673, and other cases, distinguished.
4. An agreement between husband and wife that property originally purchased with the wife's money, but into which the husband had put money and labor greatly enhancing its value, should be sold and that out of the proceeds a definite sum should be paid to the husband as a full and final division of the estate and property of the parties, is *held* in this case to be void as against public policy.
5. Independent of said void agreement, the division of property therein provided for is, upon the evidence in a divorce action between the parties thereto, *held* to be a just and equitable division.
6. A divorce judgment awarding all the property of the parties to the wife, subject to the payment of a certain sum to the husband as his share therein, but not adjudging any personal liability against the wife for such payment, is valid and proper. *Gallagher v. Gallagher*, 89 Wis. 461, distinguished.

APPEAL from a judgment of the circuit court for Taylor county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This action was brought June 26, 1916, by the appellant wife against the respondent husband for divorce on the ground of cruel and inhuman treatment. The case was tried by the court and the following findings made: That both parties have resided for two years and more immediately preceding the commencement of this action in Taylor county, Wisconsin; that they intermarried April 13, 1898, and that there is no issue of the marriage; that the defendant's conduct toward the plaintiff during their married life, and perhaps more particularly the latter part of it, has been cruel and inhuman, consisting principally of harsh and inconsiderate treatment and on some occasions of actual assault, the plaintiff being of an exceedingly nervous temperament, and it is my judgment that the source of their troubles lay in difficulties relating to property and money matters, title to the real estate being in plaintiff, and defendant insisting that he have a share of it, either in money or otherwise, and plaintiff not being willing to grant defendant's demand in that respect; that in the spring of 1898 plaintiff and defendant bought about ten forties of land in Taylor county for $600 with money belonging to plaintiff, title to which land was taken in the plaintiff, said land being purchased from the estate of D. B. Wiley, deceased stepfather of defendant; that at the time of their marriage plaintiff was the owner of other real estate which she later sold for $900, which money was put into the property purchased as aforesaid; that except for said $600 and $900 which was contributed by plaintiff, all property now owned by the plaintiff and defendant, consisting of real estate of the value of about $12,000 and machinery, live stock, and other personal property which at about the time of making the agreement between the parties, hereinafter set out, was of the value of about $2,000, is the joint accumulation of both parties; that both parties were

hard-working people, economical and frugal, and their joint efforts combined resulted in the accumulation of said property; that the defendant since their marriage worked either on the farm, improving it and managing it, or off the farm for wages, earning about $900, substantially all of which was put into the property, and the said real estate was greatly improved and its value largely enhanced by his earnings and labor; that for many years he paid the taxes on the property, both real and personal; that there is an indebtedness against the property of about $1,200 and some $400 owing to young men who worked upon the farm; that on the 12th day of February, 1916, the parties executed the following agreement:

"This indenture, made the 12th day of February, A. D. 1916, by and between *Rosa Martin* of the first part and *Joseph E. Martin,* her husband, of the second part, witnesseth:

"That in consideration of the mutual agreements and promises herein contained and other good and valuable consideration, it is agreed that said party of the first part shall, as soon as may be without unreasonable sacrifice, sell the property upon which the parties have heretofore resided, being the real property described as the southwest quarter (¼) of section four (4) and the southeast quarter (¼) of section five (5), all in town thirty-one (31) north, range 1 east, in Taylor county, Wisconsin, and also the personal property and equipment on said farm; should said property, real and personal, be sold for fourteen thousand ($14,000) dollars, then said party of the first part shall pay to the party of the second part the sum of two thousand seven hundred sixty-six dollars sixty-six cents ($2,766.66) out of the proceeds of said sale, the same to draw no interest until such sale is made; should said property be sold for less than fourteen thousand ($14,000) dollars, each of the parties hereto shall share equally the deficiency; should said property be sold for more than fourteen thousand ($14,000) dollars, each of said parties shall equally share the gain.

"It is further agreed in consideration of the premises that

the aforesaid payments are in full and final division of the estate and property of the said parties, and that neither party shall have any demand of claim against the other out of the same, or for maintenance, or support, or interest in the property of the other. Until such sale is made and adjustment completed, the payment to be made to said *Joseph Martin* shall be a charge against said land, and when such payment is made the said charge shall be satisfied of record, and for that purpose said *Joseph Martin* does hereby grant power of attorney to Herman Leicht of the city of Medford, Wisconsin, to execute such discharge as fully to all intents and purposes as he could do if personally present."

That said agreement was freely and voluntarily and understandingly made by the plaintiff and was not made in aid of separation of the parties or in contemplation of divorce; that the defendant may have intended to leave the plaintiff after such agreement was made, but a separation between them does not seem to have been in the contemplation of plaintiff; that the agreement was made for the purpose of settling property rights between plaintiff and defendant; that the provisions of said agreement with relation to the property rights of the parties is, independent of the agreement, a just and equitable division of the property of the parties.

The court concluded that the plaintiff is entitled to a judgment of absolute divorce from defendant, subject to the provisions of the statutes of this state relating to divorce; that the agreement executed between the parties February 12, 1916, is valid; that as a complete division of the property of the parties the plaintiff pay to the defendant the sum of $2,766.66 as provided in said agreement, or, as proposed by counsel for defendant after the trial, in case plaintiff does not desire to sell the property now that she pay said amount in cash or execute and deliver to defendant a note and mortgage signed by her upon her real estate for said amount within sixty days from the time of service of a copy of the

judgment upon her, said note to be due and payable at any time she desires within two years, bearing interest after six months at six per cent., and that the title to all the property of the parties, real and personal, vest in plaintiff as her share of said property, subject to the lien thereupon created by this division of property and the option herein provided, plaintiff to assume payment of the indebtedness upon the farm and to the young men for labor; that in case it should be determined upon appeal from this court that the said agreement as to the division of property is not valid, that instead of said agreement constituting a division of property I conclude that as a complete division of the property the plaintiff shall pay defendant $2,766.66 as his share of the property, and that all right, title, and interest to the property of the parties, real and personal, be awarded to plaintiff, subject to such payment.

Judgment was rendered in favor of the plaintiff, who appeals from that part of the judgment which concerns the division of property between the parties and orders that she pay defendant $2,766.66.

For the appellant there was a brief by *Hill & Spohn* of Madison, and oral argument by *W. H. Spohn.*

For the respondent there was a brief by *P. T. Stone,* attorney, and *C. B. Bird,* of counsel, both of Wausau, and oral argument by *Mr. Bird.*

KERWIN, J. It is argued by counsel for appellant that there is no authority under the law of this state in a divorce action to charge the separate estate of the wife, not derived mediately or immediately from the husband, with a lien in favor of the husband, or vest the husband with the title to any portion thereof. This contention as stated may be conceded.

The inquiry here is whether the property was derived mediately or immediately from the husband. The question

turns upon the construction of the statutes upon the subject. Sec. 2364, Stats., provides ". . . or the court may finally divide and distribute the estate, both real and personal, of the husband and so much of the estate of the wife as shall have been derived from the husband, . . ."

Sec. 2372, Stats., provides: "No judgment . . . shall in any way affect the right of a wife to the possession and control of her separate property, . . . except as provided in this chapter; and nothing contained in this chapter shall authorize the court to divest any party of his title in any real estate further than is expressly provided herein."

It is conceded that there was evidence sufficient to justify the judgment of divorce, and that the only question here is as to the division of property. The subject of divorce and distribution of property in divorce proceedings is regulated by statute in this state, and the right of distribution in this case must be found in the statutes. *Bacon v. Bacon,* 43 Wis. 197; *Brenger v. Brenger,* 142 Wis. 26, 125 N. W. 109; *Martin v. Martin,* 112 Wis. 314, 87 N. W. 232, 88 N. W. 215.

It is argued by counsel for appellant that the land to which the plaintiff had title at the time of divorce was not derived either mediately or immediately from the defendant. It is true that proceeds of property owned by plaintiff and aggregating a considerable amount, as shown by the findings and the evidence, went into the original purchase of this land. But it is also true that the estate of plaintiff was, through the money and labor of the defendant, largely enhanced in value, and the question arises whether under the statutes such property so obtained by the wife can be said to be "derived from the husband."

It is contended that the money and labor advanced, furnished, and contributed by defendant cannot be considered property derived from the husband, and *Martin v. Remington,* 100 Wis. 540, 76 N. W. 614; *Frackelton v. Frackelton,* 103 Wis. 673, 79 N. W. 750, and other cases are cited in

support of this proposition on the ground that when the husband performs labor on his wife's property, or places his own money in improving the same, it does not change the character of the property so that it is any less the wife's property.

This may be conceded, but it does not reach the situation here. The property may be the property of the wife and yet be derived from the husband so as to bring it within the operation of the statute. The estate which may be derived from the husband clearly includes property the title to which is in the wife. *Martin v. Remington, supra,* does not fall within the provisions of the statute at all. It was not a case of division of property between husband and wife in a divorce proceeding. Nor was it a case where the wife derived property from her husband. On the contrary, it appears that the money put into the property was the separate estate of the wife and the title taken in the name of the husband. The court held that a trust resulted in favor of the wife, hence the property, being the separate estate of the wife, could not be reached by the husband's creditors. A careful examination of the case will show it has no bearing upon the case at bar.

Frackelton v. Frackelton, supra, is strongly relied upon by appellant. The case is clearly not in point, as a quotation from the opinion will show. The court said:

"We do not regard this homestead as having been derived, mediately or immediately, from the husband. The evidence shows that he never had title, legal or equitable. It is true that the title was in the husband's father, and that while in that condition the husband built a house upon it, but this fact alone gave him no title nor interest in it, and the evidence fails to show any binding agreement of any kind by which the father even agreed that the husband should have any interest. When the father conveyed the property to the wife he conveyed his own property, and thus there is no way in which it can be said that the title came from the husband. Furthermore, the evidence conclusively shows that the wife has paid from her own earnings in taxes upon the property,

and in interest upon the first mortgages, more than the cost of the house. Within the rule laid down in *Gallagher v. Gallagher,* 89 Wis. 461, 61 N. W. 1104, we are forced to the conclusion that this homestead was not property derived from the husband."

In *Houghton v. Milburn,* 54 Wis. 554, 11 N. W. 517, 12 N. W. 23, it was held that where a sum of money was paid to a husband and wife, in consideration of which they covenanted to support and maintain one X. during the remainder of her natural life, the wife's interest in the sum so paid is her separate estate and she is liable upon the covenant as well as her husband.

In *Krouskop v. Shontz,* 51 Wis. 204, 8 N. W. 241, the husband and wife, engaged in business of carrying on a farm belonging to the wife, purchased goods for the use of themselves and family on credit of the separate estate of the wife, and it was held that the wife and husband became liable for such goods in an action at law, and that the rights, powers, and remedies given to married women by statute included legal power to do such acts, make contracts, etc.

In *Dayton v. Walsh,* 47 Wis. 113, 2 N. W. 65, where a married woman bought a farm from a stranger on credit, giving her notes for the purchase price secured by mortgage on the property, and her husband lived with her on the farm, carried on the business in her name and as her agent without any agreement for compensation for his services, the transaction being in good faith, it was held that the crops raised upon the farm belonged to the wife and were not subject to sale for the husband's debts.

In *Feller v. Alden,* 23 Wis. 301, the wife owned land as her separate estate, and cultivated the same by means of the labor of her husband and minor children, and it was held that the legal title to the products was in the wife and could not be taken under execution against the husband. It is said, however, in that case that whether a court, in a proper proceeding in equity, would not apportion the proceeds with

reference to the proportionate value of the wife's capital and the labor and services of the husband and minor children and subject a due proportion thereof to the payment of the husband's debts, is a question not raised in the action. None of these cases support the appellant's contention.

Scheiner v. Arnold, 142 Wis. 564, 126 N. W. 17, is relied upon. That was an action for partition, brought after the wife's death, hence the divorce statute now under consideration had no application. There it was properly held that money expended by the husband upon the wife's property in making permanent improvements which enhanced the value of the land, and payment of an incumbrance, gave the husband no claim in a partition suit after the wife's death. The contributions made by the husband to the wife's separate estate became her separate estate, but nevertheless was "derived from her husband."

The theory of our divorce statutes is to provide for an equitable division of the property of the parties, not only the property of the husband, but such property of the wife as she shall have derived either "mediately or immediately" from the husband. *Frackelton v. Frackelton,* 103 Wis. 673, 79 N. W. 750; *Gauger v. Gauger,* 157 Wis. 630, 147 N. W. 1075.

The fact that the advances made by the husband in money and labor, and which largely added to the value of the wife's separate estate, became her separate property does not save it from the operation of the statute. The aim of the statute is to secure an equitable division of property, and in accomplishing this purpose the estate of the wife derived from the husband is subject to division as well as the property of the husband. *Gauger v. Gauger, supra.* The statute is broad and covers property of every kind and description. It is not confined to specific property, the title to which has been transferred to the wife, but covers all estate "derived" from the husband. Money and labor put into the wife's property

which greatly enhanced the value of her estate manifestly constitutes, within the designation of the statutes, "estate derived from the husband."

It is insisted by appellant that the agreement of February 12, 1916, referred to in the statement of the case, was obtained through duress and was against public policy and void. The court below held that this agreement was valid, but that, independent of the agreement, the provisions of it relating to the property rights of the parties were a just and equitable division of the property of the parties.

Considerable evidence was taken in the case relating to the separate estate of the plaintiff and the property derived by her from her husband, and the court found and concluded that in case it should be determined upon appeal that the agreement as to division of property is not valid, instead of said agreement constituting a division of the property, as a complete division of property of the parties the plaintiff should pay to the defendant the sum of $2,766.66 as his share of the property, and that all right, title, and interest of the property be awarded the plaintiff, subject to such payment.

Agreements similar to the one set out in the statement of the case are not favored, and the court is of opinion that said agreement is void. The court, therefore, rests its decision upon the finding, supported by the evidence, that the distribution of property made in this case, based upon the evidence given, independent of the alleged agreement, was a reasonable and just division of property between the parties and should be sustained.

The following part of the judgment is also complained of:

"It is further ordered and adjudged that in case it should be determined upon appeal from this court that the said agreement, as to the division of the property of the parties to this action, is not valid, that instead of said agreement constituting a division of the property, then as a complete division of the property of the parties to this action the plaintiff

shall pay to the defendant the sum of $2,766.66 as his share of the property of the parties to this action; that all right, title, and interest to the property of the parties, real and personal, be awarded to the plaintiff, subject to such payment."

The contention under this head is that the court had no authority to direct the wife to pay a sum of money to the defendant and make payment thereof her personal liability, and *Gallagher v. Gallagher,* 89 Wis. 461, 61 N. W. 1104, is relied upon. But in the *Gallagher Case* the court directed the issuance of execution against the wife in case of failure to pay the amount ordered paid, and this court held it had no power to do so. In the instant case all the property is conveyed to the wife, subject to the payment of the amount found on division of property to belong to the defendant, and no personal liability is adjudged against the plaintiff. We therefore see no objection to the form of the judgment.

We are of opinion upon the evidence and record before us that the division of property was fair, equitable, and just, therefore that the judgment should be affirmed.

By the Court.—Judgment affirmed.

STRYK, Respondent, vs. MNICHOWICZ, Appellant.

March 7—April 3, 1918.

Fraud: Criminal act induced by false representations: Master and servant: Illegal employment of boy under sixteen: Recovery by employer against parent: Evidence: Relevancy: Costs: Time limited for perfecting judgment: Special verdict.

1. One who is induced by false representations to do an act which, in consequence of such representations and without negligence on his part, he believes to be neither illegal nor immoral, and which would not be illegal or immoral if the representations were true, but which is in fact a criminal offense, may recover

from the maker of the representations any damages sustained by him proximately resulting from the act.

2. The rule that a minor, suffering an injury while engaged in an employment which the law forbids him to be engaged in on account of his age, cannot be barred of his recovery nor subjected to an action or counterclaim for damages because he misrepresented his age when he was employed, does not apply to the father or other third person upon the faith of whose false representations the minor was employed.
3. In an action by an employer against a father who, by false representations as to the age of his son, had induced the plaintiff to employ the son in violation of law, a question on plaintiff's cross-examination as to whether he knowingly had, at the time he hired defendant's son, other boys under sixteen years old working in his factory, was properly excluded, there being no offer to show that such boys were employed in violation of law.
4. Testimony of witnesses in such case that they had worked for plaintiff on prohibited machinery while they were under sixteen years of age was properly excluded, there being no offer to show that plaintiff either knew or ought to have known that they were under the required age.
5. Sec. 2894*a*, Stats., requiring the successful party to perfect judgment within sixty days after verdict or forfeit costs, does not apply in case of a special verdict finding the facts only. The sixty days does not begin to run in such case until the court decides who is the successful party.

OWEN and ESCHWEILER, JJ., dissent.

APPEAL from a judgment of the circuit court for Taylor county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action for damages for deceit. The plaintiff operates a box factory. The defendant's son, Alfonse, Jr., was employed by the plaintiff in his factory October 14, 1914, and injured in the course of that employment December 11, 1914. The boy was but fourteen years of age at the time of his employment, but the plaintiff claims that the defendant, for the purpose of securing the employment of his son, represented that the son was over sixteen years of age at the time, and that the son was employed on the faith of that representation. The making of any such representation is denied by the defendant. The son's leg was broken while working

about some of the machinery of the mill. The plaintiff provided medical care and offered compensation at the rate provided by the Workmen's Compensation Law, but it was refused by the boy's parents and action was brought by the boy against the plaintiff for damages on the ground that he was under sixteen years of age and had been put at work at machinery dangerous to life and limb, in violation of sub. 2, sec. 1728*a*, Stats. 1915, which forbids the employment of minors under sixteen years of age at any employment dangerous to life or limb. This action was tried and resulted in a special verdict finding that the boy was under sixteen years of age when injured; that the machine at which he was employed was dangerous to the life and limb of a person under that age, and assessing the damages at $250. The plaintiff was insured against liability under the Workmen's Compensation Law, but the policy did not cover damages suffered by reason of injuries or death of a minor employed contrary to law. The plaintiff, therefore, was obliged to pay the judgment in favor of the boy and also defray the expenses of the litigation. In this action he seeks to recover those sums.

The jury returned the following special verdict:

"(1) Did *Alfonse Mnichowicz,* in October, 1914, and before his son Alfonse entered the employ of *Anton Stryk* and Malim Stryk, represent to said Malim Stryk that the boy was then sixteen years old? *A.* Yes.

"(2) If your answer to the first question is 'Yes,' then did the defendant, *Alfonse Mnichowicz, Sr.,* make such representation for the purpose of inducing the plaintiff and Malim Stryk to employ the defendant's son Alfonse? *A.* Yes.

"(3) If your answer to the first question is 'Yes,' then did the plaintiff rely upon such representation at all of the time the boy was employed by the plaintiff up to the time of his injury? *A.* Yes.

"(4) If your answer to the first question is 'Yes' and your answer to the third question is 'Yes,' then did the plaintiff,

up to the time of the boy's injury, exercise ordinary care in relying upon the representation so made by the defendant? *A.* Yes.

"(5) What sum did the plaintiff reasonably expend, in addition to the payment of the judgment of $362.62, as a result of the employment of the boy Alfonse? *A.* $200."

The defendant appeals from judgment on the verdict in plaintiff's favor.

The cause was submitted for the appellant on the briefs of *A. L. Smongeski* of Stevens Point, and for the respondent on that of *Herman Leicht* of Medford.

WINSLOW, C. J. The following propositions are decided in this case:

1. Where a person is induced by the false representation of another to do an act which in consequence of such misrepresentation he (without negligence on his part) believes to be neither illegal nor immoral, and which would not be illegal or immoral if the representation were true, but which is in fact a criminal offense, he may recover from the maker of the representation any damages sustained by him proximately resulting from the act. *Burrows v. Rhodes,* [1899] 1 Q. B. 816; *Morrill v. Palmer,* 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411; *Hess v. Culver,* 77 Mich. 598, 43 N. W. 994.

2. The rule that a minor, suffering an injury while engaged in an employment which the law forbids him to be engaged in on account of his age, cannot be barred of his recovery nor subjected to an action or counterclaim for damages because he misrepresented his age when he was employed (*Stetz v. F. Mayer B. & S. Co.* 163 Wis. 151, 156 N. W. 971), does not apply to the father or other third person upon the faith of whose false representations the minor was employed. The law prohibiting the employment of children of tender years at dangerous occupations is for the protection of the children themselves, and public policy forbids that they should be capable of dispensing with its provisions. The same consideration, however, does not apply to the act

of the parent. No good reason is perceived why he should not answer for his wrong.

3. The findings of the jury in the present case are supported by sufficient evidence, and when taken in connection with admitted facts sustain the judgment.

4. The plaintiff was asked on cross-examination if he knowingly had in his employ, working at the factory, boys under sixteen years of age at the time he hired the defendant's son, and an objection to the question was sustained. There was no offer to show that such boys, if employed, were employed in violation of law, *i. e.* at any prohibited occupation or without a permit such as the law requires. There may be other reasons justifying the ruling, but this seems sufficient.

5. Witnesses were called to testify that they worked for the plaintiff on prohibited machinery several years ago when they were under sixteen years of age, and objection to such testimony was sustained. This ruling was correct for the reason that there was no offer to show that the plaintiff either knew or ought to have known that the witnesses were under the required age.

6. Sec. 2894*a*, Stats., requiring the successful party to perfect the judgment within sixty days after the filing of findings or rendition of a verdict or forfeit his right to costs, plainly does not apply to a case in which a special verdict finding the facts alone is rendered. *Colle v. K., G. B. & W. R. Co.* 149 Wis. 96, 135 N. W. 536. No one can tell in such case which party is successful until the court makes a decision or finding on the question. Necessarily the sixty days does not begin to run until that decision is made.

Other questions are raised, but they are not deemed of sufficient merit to require discussion.

By the Court.—Judgment affirmed.

OWEN, J. (*dissenting*). The statutes of this state prohibit the employment of minors under specified ages in cer-

tain occupations dangerous to life and safety and prescribe criminal penalties for their violation. In *Pinoza v. Northern C. Co.* 152 Wis. 473, 140 N. W. 84, it was held that one who employed minors in violation of such statutes was guilty of gross negligence and was practically defenseless in an action brought for damages for personal injuries sustained by a minor while so employed. In *Stetz v. F. Mayer B. & S. Co.* 163 Wis. 151, 156 N. W. 971, it was held that neither the misrepresentation of the minor so employed, nor that of his father, with reference to his age at the time of his employment could be shown in defense to an action by the minor to recover for personal injuries sustained in such employment. These cases were grounded on considerations of sound public policy and have been accorded distinct legislative and general public approval. They have compelled respect for our child-labor laws and have been more potent in restraining their violation than criminal penalties and all other agencies tending to that accomplishment.

It is now decided by this court that where a father misrepresents to an employer of labor that his son is of employable age, and such son is employed pursuant to such representation, and sustains injuries while in such employment and a recovery is had of such employer for injuries sustained by the minor while so employed, the employer may sue the father in an action for deceit because of the false representations concerning the age of the child, and recoup himself for damages to which he was subjected in the personal injury suit of the son. The practical effect of this decision cannot be doubtful. It is as certain as the instincts of human nature. The *Pinoza* and *Stetz Cases* are devitalized. They have lost their potency as a restraining influence upon those who would employ children in defiance of our statutes.

There are just two classes interested in the employment of child labor: first, the parents, desirous of converting their children into wage earners; and second, those who may prof-

itably use such labor. The lawmakers have recognized this, and in order to compel observance of child-labor restrictions have visited penalties upon the parents, and upon the employers of such labor. The two interested in the employment of such labor, under the decision in this case, may now connive to this end without fear of the consequences arising from the doctrine of the *Pinoza* and *Stetz Cases*. The father may take his son to an employer of labor, give assurance that he is of employable age, and the employer may rely solely upon such assurance and set the child at work. It is true that if injured while so employed the representation made by the father will not avail the employer in an action brought in the name of the minor for a recovery for personal injuries. But we may rest assured that such action will not be brought. From the very nature of things, such action is under the practical control of the father; and he has but to be reminded that if such action be brought the employer will proceed to recoup himself in a tort action against the father. Right here it is said that this weapon in the hands of the employer will not be effective, because the father, as a rule, is irresponsible, and the cause of action which this decision gives to the employer will not restrain the father from insisting upon the action in favor of the son. To this suggestion there are two answers: First, that the effect of this decision should be tested upon the hypothesis that the father is responsible, in which case it must be conceded that the cause of action given by the *Pinoza* and *Stetz Cases* in favor of the minor results in no harm to the employer. The second answer is that the employer may so picture the dire consequences of a tort judgment to the father that rather than invite their visitation he will permit the son's action to lie dormant. This, it seems to me, is the inevitable, practical result of the decision in this case.

The right of action here sanctioned may well be denied upon grounds of public policy, the promotion of the general

welfare, and in the interests of the enforcement of our child-labor laws. It may also be firmly grounded upon another consideration, and that is that the employer of labor has no right to rely upon the representation of the father who is so keen to convert his children into revenue producers that legislative restraint in the form of criminal penalties is deemed necessary.

By sec. 1728*j*, Stats., it is provided that when there is any doubt in a court proceeding as to the age of any child a verified baptismal certificate or a duly attested birth certificate shall be produced and filed with the court. In case such certificates cannot be secured, upon proof of such fact the record of age stated in the first school enrolment of such child shall be admissible as evidence thereof. It requires no argument that in this state, at this time, the employment of children of unsuitable age in dangerous employments is of great public concern. Our comprehensive statutes upon the subject disclose indubitable evidence of legislative recognition of that fact, and the decisions in the *Pinoza* and *Stetz Cases* indicate a commendable judicial concurrence. When the importance of this matter is so generally conceded, I hold that an employer of labor should not be permitted to rely upon the representations made by the father concerning the age of his child whom he proffers for employment. His responsibility should be less shifting and evasive. He should be required to satisfy himself in some of the methods mentioned in sec. 1728*j*, Stats., or by some other reliable evidence, that the minor is of employable age. For these reasons I think the judgment in this case should be reversed, with instructions to dismiss plaintiff's complaint. I therefore most respectfully dissent.

ESCHWEILER, J. I concur in the foregoing dissenting opinion of Justice OWEN.

RATHENBERGER, Respondent, vs. JACOB, Appellant.

March 7—April 3, 1918.

Appeal: Affirmance by equally divided court: Master and servant: Breach of duty: Forfeiture of compensation.

A decision of the circuit court to the effect that a salesman whose employer's contract of agency with an automobile company was to expire at an early date did not, by soliciting for himself the appointment to such agency after that date, so breach his contract with his employer as to forfeit the amount due to him thereunder, is affirmed, this court being equally divided on the question.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

Plaintiff was a salesman in the employ of defendant, who had a contract with the Ford Motor Company for an agency in this state. Defendant's contract expired August 1, 1915. During June and July of that year and while still in defendant's employ as such salesman the plaintiff and a third person circulated and obtained signatures to a petition recommending plaintiff and such other person to the Ford Motor Company for appointment to the agency then held by the defendant for the new term commencing at the expiration of defendant's then existing contract.

The efforts of plaintiff were unsuccessful in that regard and defendant obtained a renewal on his contract. Defendant did not know of such efforts by the plaintiff until after August 1st, and then refused to pay a balance claimed by plaintiff under the contract between them on the ground that there had been a breach of duty by plaintiff towards the defendant in so soliciting such new contract for himself while in defendant's employ.

The action was tried without a jury, and the court found that plaintiff's efforts to secure the agency did not constitute a breach of his contract with defendant and did not work a

forfeiture of the amount claimed by him, and granted him judgment for the amount claimed. From this judgment defendant appealed.

For the appellant there was a brief by *Kreutzer, Bird, Okoneski & Puchner* of Wausau, and oral argument by *C. B. Bird.*

For the respondent the cause was submitted on the brief of *E. A. Morse* of Antigo.

ESCHWEILER, J. Justice ROSENBERRY did not participate in this case. The Chief Justice and Justices VINJE and OWEN are of the opinion that the judgment should be reversed; Justices SIEBECKER, KERWIN, and the writer that it should be affirmed. It follows under the rule that the judgment of the lower court must be affirmed. *Estate of Carter, ante,* p. 89, 166 N. W. 657.

By the Court.—The judgment of the circuit court is affirmed.

GNAT, Appellant, vs. WESTCHESTER FIRE INSURANCE COMPANY OF NEW YORK, Respondent.

March 8—April 3, 1918.

Principal and agent: Ratification of unauthorized contract: Fire insurance: "Procuring" further insurance: Avoidance of policy.

1. A person cannot retain the avails of an unauthorized contract, made for his benefit by another assuming to act as his agent, and repudiate the responsibilities of such contract, and any attempt so to do, with full knowledge of the facts, constitutes a ratification of the unauthorized act and creates a liability on the part of such person to the same extent as if such contract were originally authorized.
2. After a father had, in February, insured his dwelling in the defendant company, his son gave him a policy in another company which he had procured in the previous December as a Christmas present. The father accepted the policy from the son,

retained it, and, after the dwelling was burned, was paid by that company its share of the loss. *Held* that, whether the act of the son was an agency transaction, the making of a contract by one for the benefit of another, or a gift, the father had, by ratification or acceptance, "procured" further insurance in violation of a condition in defendant's policy.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

This is an action to recover on a fire insurance policy. The jury returned a verdict in favor of the plaintiff. The court ordered judgment in favor of the defendant notwithstanding the verdict, and from the judgment so entered plaintiff appealed. The facts are sufficiently stated in the opinion.

For the appellant there was a brief by *Kreutzer, Bird, Okoneski & Puchner* of Wausau, and oral argument by *C. B. Bird.*

For the respondent the cause was submitted on the brief of *E. D. Minahan* of Rhinelander.

OWEN, J. John Gnat, son of *Vincent Gnat,* who was a locomotive fireman, hearing his father and mother discussing the matter of procuring fire insurance on their dwelling, outbuildings, and contents, concluded to make them a Christmas present of a fire insurance policy on such property. On the 17th day of December, 1915, he applied to an insurance agent, Mr. Teal, of Rhinelander, for insurance on the property of his father above mentioned, and a policy was accordingly issued in the name of *Vincent Gnat* which went into effect December 29, 1915. This policy was delivered to John Gnat about January 10th. He carried it in his pocket until about February 22d, when he presented it to his father. John Gnat's testimony as to what occurred when he presented the policy to his father is as follows:

"He said to me, 'Why, I have got a policy already,' and I says, 'You have!' He said, 'Yes,' and I says, 'When did you

get it?' He said, 'About 2d of February.' I said, 'Who did you get it from?' He said, 'From Barnes & Weesner.' Well, I says, 'Too bad. I have got this for you for a Christmas present.' He didn't know what to do then; so it was getting kind of late and I had been working about fifteen or sixteen hours, was tired and sleepy, and so went to bed. I don't know what my father did with it then."

The father testified: "I didn't return that policy that my son gave me because I didn't know that it would hurt my policy." It is undisputed that he kept both policies in a private box in his dwelling. On January 21, 1916, the house with its contents covered by the insurance was completely destroyed. The Globe & Rutgers Fire Insurance Company adjusted and paid the loss under its policy. The *Westchester Fire Insurance Company of New York* refused to make adjustment or settlement under its policy, and this action was brought to recover on the policy issued by it to *Vincent Gnat* on the 2d day of February, 1916.

The policy was a standard form, and, as provided by sec. 1941—46, Stats., contained this provision:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The defense is that this provision of the policy was violated by the procurement of the issuance of the policy by the Globe & Rutgers Fire Insurance Company of New York.

Appellant contends he did not procure the issuance of the Globe & Rutgers policy, but that said policy was procured by his son without his consent or authority, and that *he* did not procure the issuance of subsequent insurance in violation of the provision of the policy above quoted. This might have been the situation up to the time he acquired knowledge of the existence of the Globe & Rutgers policy; but, having accepted the Globe & Rutgers policy, placed it in his private

box along with his other policy, and having made adjustment with the Globe & Rutgers Company for its part of the loss, he is not now in a position to deny that the subsequent policy was procured by him. A person cannot retain the avails of an unauthorized contract, made for his benefit by another assuming to act as his agent, and repudiate the responsibilities of such contract, and any attempt so to do, with full knowledge of the facts, constitutes a ratification of the unauthorized act and creates a liability on the part of such person to the same extent as if such contract were originally authorized. *McDermott v. Jackson,* 97 Wis. 64, 72 N. W. 375; *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 90 N. W. 476; *Twentieth Century Co. v. Quilling,* 136 Wis. 481, 487, 117 N. W. 1007.

It is further contended that the procurement of the insurance by the son was not an agency transaction; that the son procured it on his own responsibility and presented it to his father as a gift. We shall not spend much time in analyzing this transaction with a view of determining whether it was an agency transaction, a contract made by one for the benefit of another, or a gift. The acceptance and retention of the policy by the father was wholly inconsistent with the contention that it was not regarded by him as a binding contract and valid policy of insurance for his benefit. This is especially true in view of his statement that he did not know that "it would hurt his policy," and the fact of his making settlement with the Globe & Rutgers Company adds still greater certainty in the matter of his intentions and purposes in accepting and retaining the Globe & Rutgers policy. But whatever his intentions, it clearly was his duty to repudiate the action of his son in procuring this insurance and to refuse to accept the policy. This he did not do. If the transaction was with an unauthorized agent, he ratified the act; if it was that of a contract made by one for the benefit of another, he adopted it; and if it was a gift made by son to

father, he accepted the gift. So that in any view we take of the nature of the transaction the result is the same. It must be held that plaintiff's conduct at the time his son presented him with the Globe & Rutgers policy amounted to the procuring of further insurance on the property in violation of a condition in the policy sued upon, and that by reason of such breach he cannot recover here. This was the ruling, under similar circumstances, in *McKelvy v. German-American Ins. Co.* 161 Pa. St. 279, 28 Atl. 1115, and *German Ins. Co. v. Emporia M. L. & S. Asso.* 9 Kan. App. 803, 59 Pac. 1092, and cases cited in the opinion.

We fully appreciate the loss to which plaintiff has unwittingly subjected himself, and regret the consequences to him. The provision of the statute, however, here under consideration is intended to prevent the securing of over-insurance and the consequent incentive to incendiarism. It is founded on sound public policy, and it is better that the plaintiff be compelled to take his loss than that we point the way to the circumvention of this very wholesome statutory provision.

By the Court.—Judgment affirmed.

MEYERS, Plaintiff in error, vs. THE STATE, Defendant in error.

March 8—April 3, 1918.

Infants: Enticement: Statute construed: "Committed."

Sec. 4587b, Stats., providing for punishment of "any person who shall entice or seek to entice any child away from the person or place to which it has been committed for safe-keeping pursuant to law, or who shall interfere with the care, custody, control, personal liberty or education of any such child," does not refer to children living at home with their parents, the word "committed" meaning a legal commitment.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Reversed.*

The plaintiff in error was tried, convicted, and sentenced (under sec. 4587*b*, Stats.) for enticing and interfering with the custody and personal liberty of a girl fourteen years of age, and brings error to reverse the judgment.

Sec. 4587*b* reads as follows:

"Any person who shall entice or seek to entice any child away from the person or place to which it has been committed for safe-keeping pursuant to law, or who shall interfere in any manner with the care, custody, control, personal liberty or education of any such child, except pursuant to law, shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not more than six months."

The evidence shows that the plaintiff in error, meeting the girl in the street, offered her twenty-five cents to go into the alley with him for immoral purposes, but that she refused to go. The girl lived with her parents and had never been committed for safe-keeping to any person or place.

Peter R. Feldman of Milwaukee, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *F. F. Groelle,* assistant district attorney, and oral argument by *Arthur H. Bartelt,* assistant district attorney.

WINSLOW, C. J. It is evident that the conviction cannot be sustained. The statute quoted plainly does not refer to children living at home with their parents, but is for the protection of delinquent or neglected children who have been committed by a magistrate or court to the care of some institution or person to promote their welfare.

The word "committed" unquestionably means a legal commitment. This seems plain from a mere reading of the section, but it is rendered certain by reference to its history.

It is in substance sec. 3 of ch. 353, Laws 1887 (as amended by ch. 200, Laws 1889), which chapter provided by sec. 1 that children whose physical or moral welfare was endangered by the neglect or viciousness of their parents or guardians might be taken from their custody and provided with a home by the county or municipal judge, and by secs. 2 and 3 that the parents or guardian of such a child should not interfere with its custody, and that any person seeking to entice such a child away from such home or interfering in any manner with its care or custody should be guilty of an offense.

When the revision of 1898 took place the revisers combined the first two sections of the law and placed them in their natural place, at the end of ch. 175, treating of proceedings in county courts, numbering the new section 4052*b*, and placed the third section in its natural place in ch. 186, relating to offenses against chastity, morality, etc., numbering it 4587*b*. At the foot of the last-named section appears this significant note: "Part of ch. 353, 1887, and ch. 200, 1889; the remainder is in sec. 4052*b*." This precludes the idea that there was any intention of making any such radical change in the scope of the statute as would be necessary to make in order to sustain this conviction. Perhaps there should be statutes covering the present case, but that is a question for the legislature, not the courts.

By the Court.—Judgment reversed, and action remanded with directions to discharge the plaintiff in error from custody.

WILLIAMS, Appellant, vs. CITY OF OCONOMOWOC, Respondent.

January 8—April 30, 1918.

Deeds: Conditions subsequent: Validity: Breach: Re-entry: Action at law or in equity? Ejectment: Pleading: Practice: Grant to "charitable use:" Public park: Suspension of power of alienation.

1. One who claims title to land by reason of the breach of a condition subsequent contained in a conveyance thereof should proceed by an action at law; but if his complaint states facts constituting a cause of action in ejectment, a demurrer thereto should be overruled, even though the prayer be for equitable relief.
2. A complaint in such case containing no formal allegation that there has been a re-entry on account of the breach of condition does not state a good cause of action in ejectment.
3. If the facts stated in a complaint constitute a cause of action it is immaterial whether it be at law or in equity, except for the purpose of determining whether the parties are entitled to a jury trial under sec. 5, art. I, Const.; and that question (including the question whether plaintiff has an adequate remedy at law) may be raised by motion to place upon the court or jury calendar, or to strike therefrom, as the case may be.
4. Land conveyed to a municipality for a public park is given or granted to a "charitable use," and conditions annexed to the grant are not subject to the restrictions contained in secs. 2038, 2039, Stats., in respect to the suspension of the absolute power of alienation.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The complaint alleges the corporate character of the defendant; that the plaintiff and one Lora L. Van Alstine were on the 24th day of December, 1910, the owners in fee simple of the lands described; that on said date the plaintiff and the said Lora L. Van Alstine entered into a written agreement with the defendant in the form of a proposition and acceptance thereof by the common council for the dedication of the lands hereinafter described as a public park,

and pursuant thereto the plaintiff and Lora L. Van Alstine made, executed, and delivered the following conveyance:

"Now, therefore, in consideration of one dollar in hand paid to said grantors by said grantee, and in consideration of the obligation and covenants of said grantee, as hereinafter stated, the said grantors do grant, bargain, sell and convey and warrant unto said grantee, to have and to hold unto its sole use forever, the real estate described as lots twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), of Westover's plat of the Summit addition to the village (now city) of *Oconomowoc,* in Waukesha county, Wisconsin, upon the terms and conditions as follows:

"The said grantee, by the acceptance of this conveyance, covenants with the grantor and with the heirs at law of the said *Louise C. Williams, in esse* or hereafter born, as follows: The grantee will, within two years from this date, fill said lots to a grade equal to or somewhat higher than the proper grade of Silver Lake street adjoining said lots. Will fill said premises with soil, ashes, and street scrapings, and will never permit them to be used for dumping unsightly rubbish or old iron, tin, garbage, or other nuisance. Will immediately after filling said lots convert them into a park for the use of the public. Will permit no buildings other than those appropriate for a park for public use to be ever erected or maintained thereon. Will name said premises 'Westover Park' and will never change the name thereof. Will never alienate, convey, or lease said premises to any private person or persons or corporation. Will never permit or suffer intoxicating liquors to be sold, brought, used, or given away thereon. If the grantee shall fail to perform any of its covenants herein, the title and possession of said lots and all improvements thereon shall immediately revert to the said *Louise C. Williams,* or to her heirs at law."

Such conveyance was duly executed, acknowledged, accepted by the defendant, and recorded.

The complaint then alleges that the lands described in the instrument constitute a single body of land and are vacant and unoccupied; that the defendant failed and neglected to

fill said premises to grade within two years from the date of the conveyance; that the defendant has not at any time converted said premises into a park for public use; that said premises have never been used as and for a park; that the defendant has permitted the surface of said premises to remain in a rough, uneven condition, with patches of noxious weeds and other offensive growth, and that clusters of limbs from trees lie upon it, and that numerous trees of original swamp growth, repulsive in aspect, remain thereon; that the defendant has abandoned the dedication of said premises, and has wholly failed to perform the conditions and covenants contained in said conveyance, and that the title thereto has reverted to the plaintiff, and that the recorded conveyance constitutes a cloud upon plaintiff's title.

The defendant demurred to the complaint upon three grounds: (1) That the plaintiff had an adequate remedy at law; (2) that the complaint did not state facts sufficient to constitute a cause of action; and (3) that there was a defect of parties plaintiff. The demurrer was sustained by the trial court, with leave to plaintiff to amend. From the order sustaining the demurrer plaintiff appeals.

For the appellant there was a brief by *J. Henry Westover* of Oconomowoc, and oral argument by *C. H. Van Alstine* of Milwaukee.

Timothy T. Cronin of Oconomowoc, attorney, and *Oliver S. Rundell* of Madison, of counsel, for the respondent.

The following opinion was filed February 5, 1918:

ROSENBERRY, J. From the facts set forth in the complaint it appears that plaintiff claims title to said premises by reason of the breach of a condition subsequent contained in the deed, and in such circumstances this court has held that the plaintiff should proceed by an action at law. *Mash v. Bloom,* 130 Wis. 366, 110 N. W. 203, 268. However this may be, the facts necessary to state a good cause of ac-

tion in ejectment appearing, the court should not have sustained the demurrer, but should have overruled it. Sec. 2649*a*, Stats. 1917. The prayer for relief is no part of the cause of action. *North Side L. & B. Soc. v. Nakielski,* 127 Wis. 539, 106 N. W. 1097. Where the facts stated in a complaint constitute a cause of action, it is immaterial whether it be at law or in equity, except for the purpose of determining whether the parties are entitled to a jury trial, in accordance with the provisions of sec. 5, art. I, Const. Formerly the objection that the plaintiff who set up facts constituting an equitable action had an adequate remedy at law was waived unless raised by demurrer or answer. *Boorman v. Sunnuchs,* 42 Wis. 233, 247. Under present practice the better procedure is to raise the question by motion to place upon the court or jury calendar, or to strike therefrom, as the case may be. 31 Cyc. 291. Pleading is no longer like a checker game—one in which the most skilful player wins. The pleader may now jump both ways without first getting into the king row.

The proposition that there is a defect of parties plaintiff was practically abandoned upon the argument.

The defendant claims that the complaint does not state a cause of action for the reason that by the terms of the conveyance the power of alienation is suspended for a longer time than is permitted by secs. 2038 and 2039, Stats. Defendant frankly admits that if its contention in this respect is upheld, prior decisions of this court must be in effect overruled. While a learned argument has been presented on that proposition, we shall not further consider it here, because, the conveyance here being for a charitable use, a public park, secs. 2038 and 2039 do not apply. 11 Corp. Jur. 325, § 36 and cases cited; 5 Ruling Case Law, 339 and cases cited; Bouv. Law Dict. Charitable Uses (Rawle's Rev.).

Since the decisions in *Danforth v. Oshkosh,* 119 Wis. 262, 97 N. W. 258, and *Beurhaus v. Cole,* 94 Wis. 617, 69 N. W.

986, sec. 2039, Stats., has been amended by the insertion of the words "to a charitable use or" (ch. 511, Laws 1905), and hence those decisions are no longer applicable. In this connection we call attention to the provisions of sec. 1787*e*, which provides that all gifts to public park corporations shall be devoted to park purposes without being subject to the limitations and restrictions provided by law in other cases. Sec. 2263 also provides that where lands are designated upon any plat as donated to the public or other grantees therein named, it shall be deemed a sufficient conveyance, and lands so conveyed shall be held by the grantees in trust for the uses and purposes set forth in the plat and for no other. Under such a conveyance there would be a complete suspension of the power of alienation. The legislative policy of the state as to lands conveyed for park purposes is clear and consistent. It must be held that the conditions annexed to the grant are valid and that the facts alleged in the complaint state a cause of action.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

The respondent moved for a rehearing, and the following opinion was filed April 30, 1918:

ROSENBERRY, J. It is stated in the opinion in this case, *ante,* pp. 283–84, 166 N. W. 322, "the facts necessary to state a good cause of action in ejectment appearing, the court should not have sustained the demurrer, but should have overruled it." It is called to our attention that the complaint contains no formal allegation that there has been any re-entry on account of the breach of the condition subsequent, and that therefore the complaint does not state a cause of action in ejectment, citing *Mash v. Bloom,* 133 Wis. 646, 114 N. W. 457.

Upon re-examination of the complaint it appears that this

position is well taken. Therefore the demurrer should have been sustained, with leave to the plaintiff to amend her complaint if she so desires. The mandate will be modified accordingly.

By the Court.—Motion denied, without costs. The order appealed from is affirmed, and the cause is remanded for further proceedings in accordance with this opinion.

WILL OF HALL: HARRINGTON and others, Respondents, vs. HALL, Appellant.

January 8—April 30, 1918.

Wills: Execution: Evidence: Presumption from recitals in attestation clause.

The presumption arising from recitals in the attestation clause showing due execution of a will is *held* in this case to have been overcome by the evidence, which supports the findings of the county and circuit courts that the will was not properly executed.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

The appeal is from a judgment denying probate of the alleged will of Eliza J. Hall, deceased. Eliza J. Hall died in 1914 at the age of eighty-nine years, and the alleged will propounded was executed about a year before her death. For a period of about eight years before her death she was blind or partially so. Her signature to the will was written by one Whitenack, with her mark attached thereto. The witnesses to the attestation clause are Anton Fay and Nora Elkey. At the end of the instrument this appears: "Signed and witnessed in my presence this 9th day of May, 1913. J. T. Whitenack, Notary Public."

The objections to the probate of the will were (1) that it

was not executed as provided by law; (2) undue influence; (3) mental incompetency. The second and third objections were not seriously relied upon at the trial.

The county court held that the will was not properly executed and hence was not the will of Eliza J. Hall, and denied probate thereto. On appeal the circuit court affirmed the judgment of the county court. Both the county court and the circuit court wrote lengthy opinions discussing the material questions involved, including the evidence produced, which opinions are in the record. From the judgment of the circuit court this appeal was taken.

C. W. Lomas of Green Bay, for the appellant.

For the respondents there was a brief by *Sheridan, Evans & Merrill* of Green Bay, and oral argument by *Philip Sheridan.*

The following opinion was filed February 5, 1918:

KERWIN, J. The main contention on the part of appellant is that the presumption of the attestation clause should support the will.

The will purports to have been executed May 9, 1913, and is substantially in due form. The appellant is named as executor. After the formal attestation clause appears the following: "She making her mark because of failure of her eyesight." There is evidence tending to show that the will was not duly executed and was not in fact the will of Mrs. Hall, the alleged testatrix. The alleged will gives the principal part of the estate of the testatrix to her son, *William A. Hall,* appellant, who had lived with testatrix for many years before her death and was her confidential adviser. Small bequests of $50 each were given to four grandchildren. The court below found, among other things, that on May 9, 1913, Eliza J. Hall, the alleged testatrix, was blind and had been for a number of years prior thereto; that the proposed instrument was in the handwriting of *William A. Hall,* the

appellant, and originally, as drawn, blanks for inserting the month in the date of the will and attesting clause were once filled in and erased and the word "May" inserted in the handwriting of appellant. Blanks were also left in the fifth, sixth, seventh, and eighth bequests to grandchildren, and the word "fifty" inserted in each in the handwriting of appellant; that Eliza J. Hall did not sign the proposed instrument in the presence of Anton Fay, Nora Elkey, or J. T. Whitenack as attesting witnesses; that there was no publication of the proposed instrument either at or before the witnesses signed, and deceased did not have full knowledge of the contents of the instrument propounded; that the word "fifty" was inserted in clauses 5, 6, 7, and 8 of said proposed instrument in the handwriting of appellant after the signing by the witnesses Fay, Elkey, and Whitenack and after the affixing of the signature of Eliza J. Hall and without the knowledge, instruction, or will of said Eliza J. Hall.

And the court concluded that the proposed instrument was not signed, sealed, published, and declared by Eliza J. Hall as her last will in presence of two competent witnesses who subscribed to the same as attesting witnesses in her presence and in the presence of each other; that the proposed instrument was not the will of Eliza J. Hall, deceased.

The appellant lived with his mother, Eliza J. Hall, for many years before her death and had during such time received considerable property from her. Two wills were made before the one in question. One C. W. Lomas drew the first and Mr. J. T. Whitenack, who acknowledged the last will, drew the second, and appellant drew the last will which is under consideration here. Three of the grandchildren of Mrs. Hall, namely, *E. S. Hall, May Harrington,* and *Maud Bren,* are contestants, each having received by the terms of the proposed will $50. It appears that the prior wills gave the contestants larger legacies than the propounded will. It also appears from the evidence, and the court below found,

that the will bears evidence that as originally drawn the amount bequeathed to grandchildren was not inserted at the time of its writing but afterwards. It is conceded that after the death of Mrs. Hall the appellant burned the two wills drawn prior to the last.

There is considerable conflict in the evidence on the part of the appellant respecting due execution of the proposed will. This conflict obviously arises from confusion of the facts respecting execution and parties present when the second will was executed, with what occurred and who were present when the last will was signed. It was stipulated that the testimony taken in county court should be received and treated as testimony taken upon the trial in the circuit court. The testimony is reviewed and discussed in the opinions of both the county and circuit courts. On the part of the contestants the evidence of Nora Elkey, a witness to the will, is clear, specific, and positive to the effect that the will was not properly executed and was not in fact the will of Eliza J. Hall, deceased. Nora Elkey testified that she and Fay signed the last will as witnesses, but that Mrs. Hall had not signed it or made her mark; that she and Fay signed because appellant asked them to sign as witnesses; that after Fay and *Hall* went away and on the same day she read the whole will to Mrs. Hall with the exception of a clause therein relating to oil stock; that at that time Mrs. Hall had not signed the will either by signature or mark; and that the amount to go to the grandchildren was not written in the will, but that after the name of each grandchild the amount was left blank; that afterwards she saw the will in appellant's bureau drawer and that it did not then bear Mrs. Hall's name or mark; that the first time she knew or saw Mrs. Hall's name attached to the will was when it was produced in county court; and she states positively that when she and Fay signed as witnesses Whitenack was not present nor was Mrs. Hall's name or mark attached and that the blanks in

the will existed, and that Mrs. Hall never signed the will or acknowledged it as her will before them. Mr. Whitenack testifies he never drew or witnessed the execution of the second will, *Mr. Hall* and Nora Elkey testified that he did. Whitenack also testifies that *Hall* was present when he witnessed the last will, while Fay and *Mr. Hall* both say that *Hall* was not present when the will in question was executed. The county court in its opinion, in reviewing the evidence, among other things said:

"The sharp conflict of testimony is readily observed. *Mr. Hall,* Fay, and Miss Elkey say *Hall* was not present when the will was executed, Mr. Whitenack says he was. Mr. Fay says Mr. Whitenack had the will with him when they entered the house, Mr. Whitenack says testatrix gave it to him. Mr. Fay says the will was executed in the sitting room, Mr. W. says it was in the bedroom.

"Miss Elkey says the so-called second will was executed in the bedroom and the last in the sitting room. Mr. W. says the last was executed in the bedroom and admits that he signed some paper at another time in the sitting room.

"There were undoubtedly two wills made not far apart subsequent to the Lomas will.

"I believe all of these witnesses, who are all absolutely disinterested, are honestly trying to tell the truth, but they are sadly mixed as to those two wills.

"I think that Mr. Fay, who only witnessed one paper and whose signature is affixed to this last will, is not mistaken when he says it was executed in the sitting room in May. If that is so, it is not the transaction Whitenack refers to."

The court below concluded in its opinion that the testimony of Mr. Whitenack and what he recalled about the execution of Mrs. Hall's will was the so-called second will and not the will propounded in the present case. There is also other conflicting evidence between the witnesses on the part of the appellant which tends to show that the will in question here was not duly executed, but it is unnecessary to prolong this opinion by a discussion of the evidence. It is clear from the opinion of the court below that the learned judge who wrote

the opinion realized the force of recitals in the attestation clause of the will. He said:

"The recitals in the attestation clause show due execution of the will and there is strong presumption of the truth of these recitals. Wills should not be lightly set aside where there is no question of mental incompetency or undue influence. The presumption of the attestation clause should prevail unless overcome by clear and satisfactory evidence."

The judge then proceeds to show that the presumption had been fully overcome, and concluded that even if the burden of proof were upon the contestants they had fully discharged that burden.

A careful examination of the record convinces us that the findings of the court below are supported by the evidence and cannot be disturbed by this court.

By the Court.—Judgment is affirmed, with costs to respondents.

A motion for a rehearing was denied, without costs, except clerk's fees and amount paid for printing brief, on April 30, 1918.

ESTATE OF GILBERT.

January 10—April 30, 1918.

Gifts: Parent and child: Evidence: Transactions with decedents: Competency of witnesses: Bills and notes: Residence of maker out of state: Limitation of actions.

1. A finding by the circuit court to the effect that decedent had, prior to his death, made a gift to his son (since deceased) of certain notes executed by the son to his father, is *held* to be sustained by the evidence, which, among other things, shows that no confidential relation other than that of father and son existed between them.
2. The parties adverse to the son's estate having called a witness to testify to a conversation with the son and having proved by him declarations of the son to the effect that he got the notes in

question from his father, such testimony was not incompetent under sec. 4069, Stats.; and a part of the conversation between the witness and the son having been thus elicited, those representing the son's estate were entitled to show the whole of it. *Hilton v. Rahr*, 161 Wis. 619, distinguished.

3. Promissory notes, from and after the execution of which the maker resided in Minnesota and the payee in Wisconsin, were governed by sec. 4231, Stats., and were not barred by the statute of limitations.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This matter was brought in the county court on application for partial distribution of the estate of Warren Gilbert, deceased. It was held there that notes of A. C. Gilbert, hereinafter mentioned, should be set off against his interest in his father's estate, and judgment was rendered accordingly.

Appeal was taken to the circuit court from the judgment of the county court by *Helen Gilbert,* as administratrix of A. C. Gilbert, deceased, and by his heirs.

Warren Gilbert, who died August 28, 1914, was for many years prior to his death a resident of Columbia county, Wisconsin. He left a large amount of real and personal property. His wife predeceased him and he lived with his son Eugene on his farm homestead. He was the father of five sons: A. C., Charles L., Eugene, James W., and George. During his lifetime he loaned large sums of money to his sons at different times, loans being evidenced by notes. On and between October, 1892, and September, 1906, A. C. Gilbert executed and delivered to his father twenty-four notes aggregating $40,567.69. After the execution of these notes Warren Gilbert resided in Wisconsin and A. C. Gilbert in Minnesota. A. C. Gilbert died prior to the trial in county court.

The notes in question with other papers were kept in an unlocked safe in the home of Eugene Gilbert. A grandchild

of Warren Gilbert exercised control over this safe. There was a book in the safe containing a list of these notes. The notes were in the safe on January 14 and 15, 1914, and on the 19th were not there. On the trial in the court below the appellants offered evidence to the effect that in June or July, 1915, A. C. Gilbert was present when the inventory of his father's estate was being prepared. One of the appraisers asked A. C. Gilbert regarding his notes to his father, and he stated that he and his brother Eugene got their notes from their father in January and that the notes were destroyed.

The appellants then rested their case, and the representative of A. C. Gilbert, electing to stand upon the proof as made, moved for findings and judgment denying the relief sought and reversing the decree of the county court.

The appellants moved to strike out that portion of the evidence as to the declaration of A. C. Gilbert that he got the notes from his father, which was denied.

The court below held that there was a gift of the notes by the father to his son. Judgment was entered accordingly, from which this appeal was taken by *H. S. Hendrickson,* as administrator of Warren Gilbert, deceased, by *Leila Dalton, Florence Gilbert,* and Chester A. Gilbert, and by four others known as the *Spooner* minors.

H. E. Andrews of Portage, attorney for the appellant *H. S. Hendrickson* as administrator, and *Grady & Farnsworth* of Portage, attorneys for the appellants *Leila Dalton* and *Florence Gilbert,* joined in briefs for said appellants; and there was oral argument by *Mr. Daniel H. Grady* and *Mr. Andrews.*

For the appellants the *Spooner* minors there was a brief by *Harlan B. Rogers* of Portage, guardian *ad litem.*

J. E. Haycraft of Fairmont, Minnesota, and *Bogue & Sanderson* of Portage, for the respondents *Helen Gilbert,* administratrix of the estate of A. C. Gilbert, and others.

The following opinion was filed February 5, 1918:

KERWIN, J. The court below found that on January 14, 1914, Warren Gilbert, deceased, had in his possession the notes in question made by A. C. Gilbert payable to him; that on said day Warren Gilbert delivered said notes to said A. C. Gilbert, and that at said time said Warren Gilbert was mentally competent; that said Warren Gilbert at said time intended to and did make a gift of said notes to his son A. C. Gilbert; that A. C. Gilbert has been a resident of Minnesota since the execution of said notes, and that said Warren Gilbert was a resident of the state of Wisconsin from the time of the execution of said notes; and concluded as matter of law that at the time of the death of Warren Gilbert there was nothing owing by A. C. Gilbert to Warren Gilbert on account of said notes.

On the part of appellants it is contended that there was not sufficient competent evidence to support the finding to the effect that said Warren Gilbert made a gift of said notes to A. C. Gilbert; that said notes were not barred by the statutes of limitation.

On the part of respondents it is insisted that the evidence was sufficient to support a gift of said notes to A. C. Gilbert, and further that the notes were barred by the statutes of limitation.

The assignment of errors raises the questions (1) whether the court erred in refusing to strike out evidence relating to the gift, (2) in finding that Warren Gilbert delivered the notes to A. C. Gilbert intending to make a gift, and (3) in concluding that nothing was owing by A. C. Gilbert to Warren Gilbert on said notes.

It is clear that if the findings of fact of the court below are supported by the evidence the judgment is right and must be affirmed.

It is insisted by appellants that the evidence of one Bros-

sard, relative to how A. C. Gilbert got the notes, was incompetent and should have been stricken out, and further, that even if this evidence be not stricken there is not sufficient evidence in the case to support the finding of a gift of the notes to A. C. Gilbert.

The argument on the point of competency of the evidence of Brossard is that it related to a transaction with deceased, Warren Gilbert, through whom A. C. Gilbert claimed, and hence was not admissible, and that the statements of A. C. Gilbert to Brossard were self-serving declarations and not competent. Counsel relies upon sec. 4069, Stats., relating to transactions with a deceased person, and *Hilton v. Rahr,* 161 Wis. 619, 155 N. W. 116. The infirmity in the argument of counsel on this point is apparent. The appellants put Brossard on the stand in making their case and by him proved declarations of A. C. Gilbert to the effect that he got the notes in question from his father. The witness was put upon the stand by appellants to prove a conversation with A. C. Gilbert, and, having testified to a part of the conversation, the respondents were entitled to the whole conversation. Sec. 4069, Stats.; *Yeska v. Swendrzynski,* 133 Wis. 475, 113 N. W. 959; *Earley v. Winn,* 129 Wis. 291, 109 N. W. 633; *Fertig v. State,* 100 Wis. 301, 75 N. W. 960; *Smith v. Milwaukee E. R. & L. Co.* 127 Wis. 253, 106 N. W. 829; 16 Cyc. 1041.

The case of *Hilton v. Rahr, supra,* is not in point, as will clearly appear from an examination of that case and *Maldaner v. Smith,* 102 Wis. 30, 78 N. W. 140.

We are convinced that the evidence to the effect that A. C. Gilbert got the notes from his father was competent.

The conclusion of the court below upon the record is clearly shown from the following statement at the close of the evidence:

"It is plain, as I said before, that A. C. Gilbert got possession of these notes at that time, and there is nothing to

show that he got them wrongfully or that there was any insanity on the part of Warren Gilbert. I cannot presume any wrongful conduct. I am perfectly willing you should show Mr. Warren Gilbert's state of mind at that time. If he was not competent, why, of course, your position is well taken. If he was competent to make a gift, and I must presume he was, then the gift is made."

It appears from the record that no confidential relation other than father and son existed between A. C. Gilbert and his father; that A. C. Gilbert did not represent his father in any confidential or fiduciary capacity; that Warren Gilbert was a man of wealth and had taken notes from other sons for large amounts, which notes were, at the time proceedings were heard in county court, barred by the statutes of limitation; that the father was well advanced in years, and that the delivery of the notes to A. C. Gilbert was about seven months before his death. The deceased, Warren Gilbert, must have known that his demise was not far distant when A. C. Gilbert got the notes.

A contention is made by respondents that the notes of A. C. Gilbert were barred by the statutes of limitation though he resided in Minnesota. This contention is denied by appellants, and interesting and able arguments are made by both parties upon the proposition. In the view we take of the case it is not necessary to decide, and we do not decide, whether the notes of A. C. Gilbert were barred by the statutes of limitation.

Under the repeated decisions of this court the findings below cannot be disturbed unless clearly wrong. *Mechanical A. Co. v. A. Kieckhefer E. Co.* 164 Wis. 65, 159 N. W. 557. Many cases are cited by counsel for appellants from this and other courts which it is claimed sustain their contentions. But we are satisfied that the cases cited from this court are distinguishable from the case at bar. Some are cases where the incompetency of the donor was involved; others where fraud, undue influence, overreaching of the donor, and un-

fair and unnatural distribution were involved; and still others the sufficiency of proof, and confidential business relations. Most, if not all, cases from other jurisdictions may be classified under substantially the same heads.

The findings here are supported by abundance of evidence, and the judgment upon such findings and established facts is clearly right. *Killops v. Stephens,* 66 Wis. 571, 29 N. W. 390; Thornton, Gifts & Adv. secs. 248, 250, 251, 255, 262; *Jenning v. Rohde,* 99 Minn. 335, 109 N. W. 597; *Lewis v. Merritt,* 113 N. Y. 386, 21 N. E. 141; *Vann v. Edwards,* 128 N. C. 425, 39 S. E. 66; 6 Ency. of Ev. 227 and cases cited.

By the Court.—Judgment affirmed.

The following opinion was filed April 30, 1918:

KERWIN, J. A motion for rehearing was made in this case, and we are asked to decide whether the notes of A. C. Gilbert to his father, Warren Gilbert, and referred to in the original opinion in this court, were barred by the statute of limitation. This question was not decided on the former hearing because not necessary, since we held that such notes delivered by Warren Gilbert, during his lifetime, to A. C. Gilbert were a gift to A. C. Gilbert, therefore did not constitute a claim against A. C. Gilbert.

It appears that the question becomes material on settlement of the estate on the question of transfer tax, therefore we are asked to decide it. The last note was dated September 14, 1906, and fell due September 14, 1907, hence was not outlawed even if A. C. Gilbert were a resident of Wisconsin. But more than six years had elapsed from the time the cause of action accrued upon all the other notes, hence they were barred by the statute of limitation unless the residence of A. C. Gilbert in Minnesota saved them. Warren Gilbert had resided in Wisconsin for more than fifty years

before his death and A. C. Gilbert had resided in Minnesota for more than twenty years before Warren Gilbert died.

Sec. 4231, Stats., provides:

"If when the cause of action shall accrue against any person he shall be out of this state such action may be commenced within the terms herein respectively limited after such person shall return or remove to this state."

This section clearly applies to a nonresident, and where a nonresident is in the state only temporarily and less in the aggregate than the statutory period after the cause of action accrues he cannot avail himself of the statute. *Whitcomb v. Keator,* 59 Wis. 609, 18 N. W. 469.

If a party in whose favor a cause of action accrues is a resident of the state at the time of the accrual of the cause of action and the debtor is a nonresident, the statute does not run in favor of the nonresident while he continues to reside out of the state. *Nat. Bank v. Davis,* 100 Wis. 240, 75 N. W. 1005.

We think the statute above referred to, sec. 4231, controls this case, hence the notes were not barred by the statute of limitation. *State v. Nat. Acc. Soc.* 103 Wis. 208, 79 N. W. 220; *Adkins v. Loucks,* 107 Wis. 587, 83 N. W. 934; *Arp v. Allis-Chalmers Co.* 130 Wis. 454, 110 N. W. 386.

It follows that the notes were a valid subsisting obligation at the time they were surrendered to A. C. Gilbert.

By the Court.—The motion for rehearing is denied, without costs.

STATE VS. JACOBS.

January 11—April 30, 1918.

Criminal law and practice: Receiving stolen goods: Proof of guilty knowledge: Punishment for second offense: "Sentenced to imprisonment."

1. In a prosecution under sec. 4417, Stats., for knowingly receiving stolen property it was proper to instruct the jury that defendant was guilty if he purchased the property "under such facts and circumstances that he ought to have known" that it was stolen.
2. Sec. 4738, Stats., authorizing severer punishment for a second offense, applies where there had been a former conviction for an offense punishable by fine only; and one who had, as required by sec. 4633, been sentenced to imprisonment until his fine should be paid, had been "sentenced to imprisonment" within the meaning of said sec. 4738.

REPORTED from the municipal court of Milwaukee county: W. J. TURNER, Judge. *One question answered in the negative; the other in the affirmative.*

This is a proceeding under sec. 4721, Stats., to secure from this court answers to two questions certified by the municipal court of Milwaukee county.

The defendant was found guilty by a jury in that court on a charge of knowingly receiving stolen property. The information charges the defendant with the commission of four distinct offenses under sec. 4417, Stats., and also, as a fifth count, under sec. 4738, a prior conviction of an offense on February 1, 1916. The defendant filed a plea in abatement to this information, in which, among other things, he raised the question as to whether or not the facts stated in the fifth count of the information were sufficient to constitute a prior sentence under sec. 4738. The plea in abatement was overruled without prejudice, whereupon the defendant pleaded not guilty to the first four counts of the information and entered a plea of guilty to the fifth count.

The jury found the defendant guilty on the first, third,

and fourth counts of the information, acquitting him on the second count. The defendant then moved for a new trial and in arrest of judgment and requested the trial judge to certify certain questions to this court concerning the sufficiency of the count as to the prior conviction and sentence and of the correctness of the trial court's instructions, to which exception had been taken and filed.

The questions reported are:

(1) Did the court err in its charge to the jury in instructing the jury in connection with its entire charge as follows:

"The law is that if the defendant did purchase the stolen property from Mr. Fuog knowingly, or under such facts and circumstances that he ought to have known it, in other words, that he is charged with notice of it, that then he would be guilty of the offense charged against him."

(2) Did the following count in the information charge facts sufficient to constitute a prior conviction of said defendant under secs. 4736, 4737, and 4738 of the Statutes, namely:

"And I, Winfred C. Zabel, district attorney for Milwaukee county, aforesaid, hereby further inform the court that on the 1st day of February, 1916, in the municipal court of the county of Milwaukee, Wisconsin, the above named defendant, *Harry E. Jacobs,* was convicted of the crime of buying stolen property and upon said conviction was sentenced by said court to pay a fine of one hundred (100) dollars and costs, or in default thereof to be committed to the house of correction of Milwaukee county until said fine and costs be paid; but such imprisonment not to exceed in all a period of six months, which said conviction still remains of record and unreversed."

For the plaintiff there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *Arthur H. Bartelt,* assistant district attorney, and oral argument by *Mr. Zabel* and *Mr. Bartelt.*

For the defendant there was a brief by *Thomas E. Leahy* and *Herbert R. Manger* of Milwaukee, and oral argument by *Mr. Manger.*

The following opinion was filed February 5, 1918:

SIEBECKER, J. It is contended by the defendant respecting the first question certified that the part of the certified instructions to the jury declaring that the offense is proven if defendant purchased stolen "property under such facts and circumstances that he ought to have known it, in other words, that he was charged with notice of it," is an incorrect statement of the law applicable to the case. It is a well recognized rule that proof of this offense may be made by circumstantial evidence. The certified question presents the inquiry whether proof of "facts and circumstances" showing the defendant "ought to have known" that the property he bought from Mr. Fuog was stolen property constitutes proof of guilty knowledge under sec. 4417, Stats. The instruction of the trial court lays down an individual test of the defendant's guilty knowledge under the facts and circumstances adduced in evidence. This rule is approved by the courts generally as a proper test of the sufficiency of evidence to show the fact of guilty knowledge in this class of cases. The court in *Huggins v. People,* 135 Ill. 243, 25 N. E. 1002, in speaking on the subject states: "It is sufficient if the circumstances were such, accompanying the transaction, as to make the prisoner believe the goods had been stolen." Among the numerous cases sustaining this rule are: *State v. Feiss,* 74 N. J. Law, 633, 66 Atl. 418; *People v. Schooley,* 149 N. Y. 99, 43 N. E. 536; *State v. Druxinman,* 34 Wash. 257, 75 Pac. 814; *Comm. v. Leonard,* 140 Mass. 473, 4 N. E. 96. The first question must be answered in the negative.

The second question is whether the information charges facts sufficient respecting the former conviction of defendant, within the provisions of secs. 4736, 4737, and 4738, Stats., prescribing punishment for offenders previously convicted of offenses.

It appears that defendant was formerly convicted of buy-

ing stolen property and was sentenced by the court to "pay a fine of $100 and costs" and that he was sentenced to be committed to the house of correction until the fine and costs were paid, imprisonment, however, not to exceed six months. It is urged that the sentence to pay a fine and costs is not a sentence "to imprisonment" as contemplated in these sections providing increased severity of punishment for subsequent offenses. It has been held that the provisions of these statutes are a part of the criminal law regulating the sentence and judgment when persons are guilty of successive offenses. *Ingalls v. State,* 48 Wis. 647, 4 N. W. 785; *Howard v. State,* 139 Wis. 529, 121 N. W. 133. The former conviction of defendant must come within the provision of sec. 4738, Stats., if any, which provides: "When any person is convicted of any offense punishable *only* by imprisonment in the county jail *or by fine,* or both," and it is alleged and established on the trial "that he had been before sentenced to imprisonment" as therein specified and that such sentence remains of record and unreversed, "such person *may be punished* by imprisonment" as provided in this section. It is claimed that the alleged former sentence of defendant "to pay a fine and costs" and that he be committed to the house of correction in default of payment of the fine and costs until paid, not exceeding six months, is not a "sentence to imprisonment" within the terms of the provision of this section of the statutes. The language of the statute includes convictions of an offense "punishable only . . . by fine." If the statute is construed as defendant urges, then the words "or by fine" have no significance and drop out of the statute. This is not to be done if they can be given a meaning within the apparent intent of the legislative purpose to make them effective. The terms of the section in their plain and obvious meaning include a former conviction of an offense punishable "by fine only" and must be so interpreted unless they are repugnant to other provisions of

the statutes on the subject. The calls of the provision, that it must be alleged and established, in order to authorize the imposition of the severer punishment, "that he [the offender] had before been sentenced to imprisonment," are complied with by sentencing offenders punishable "by fine only" under the provisions of sec. 4633, Stats., which requires, "When a fine is imposed *as the whole* or any part of the punishment for any offense by any law, the court shall also sentence the defendant to pay the costs . . . and to be committed to the county jail until the fine and costs are paid or discharged." This form of sentence must be imposed for all convictions which are punishable "by fine only." The terms of such punishment constitute a "sentence to imprisonment" within the legislative intent and meaning of the provisions of sec. 4738, Stats.

It is to be observed that the punishments under sec. 4738, Stats., are left to be imposed by the court in its sound discretion, and hence the claim that the severer punishment provided by these statutes was not intended to apply to the successive conviction for minor offenses punishable "by fine only" is not persuasive. The statutes on the subject clearly manifest a legislative intent that the severer punishment prescribed for repeated offenses shall apply to conviction for offenses punishable *only by fine.* It follows that the count in the information certified to this court in the second question charges facts sufficient to constitute a prior conviction of the defendant under sec. 4738, Stats., and requires an affirmative answer.

By the Court.—We answer the first question "No." We answer the second question "Yes."

A motion for a rehearing was denied, without costs, on April 30, 1918.

OWEN, J., took no part.

GREEN LAKE COUNTY, Appellant, vs. CITY OF EAU CLAIRE, Respondent.

February 5—April 30, 1918.

Municipal corporations: Claims: Notice of disallowance served by mail: Doubling of time for appeal.

The twenty days allowed by sec. 25, ch. VII, of the Eau Claire city charter (Laws 1889, ch. 184) for an appeal from the disallowance of a claim by the common council is doubled, under sec. 2822, Stats., where the claim was one made by the county for aid furnished to poor persons and notice of its disallowance was served by mail as provided in secs. 1512, 2821,—such appeal, though not a "proceeding in a court of record," being the commencement of an action in such a court and the proper, if not the only, way to proceed against the city.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Judge. *Reversed.*

Claim against the city of *Eau Claire* for aid furnished to a poor person while in *Green Lake County.* A nonresident poor person whose residence is alleged to be in the city of *Eau Claire,* while at the city of Berlin in *Green Lake County* was taken suddenly ill and was furnished necessary surgical and medical attendance and hospital service, the reasonable value of which is alleged to be $120. *Green Lake County* paid this bill, and on March 29, 1916, filed its duly verified claim against the city of *Eau Claire* with the city clerk. On April 25, 1916, the claim was disallowed by the common council of the city of *Eau Claire.* On April 14, 1916, the city clerk of the city of *Eau Claire* mailed a notice of disallowance to the county clerk of *Green Lake County* by registered mail, which notice was received by the clerk of *Green Lake County* on April 15, 1916. *Green Lake County,* by its district attorney, undertook to appeal from the decision of the common council to the circuit court for Eau Claire county, and on May 12, 1916, mailed to the city clerk of the city of *Eau Claire* a notice of appeal, which was received by the city clerk on May 13, 1916, twenty-seven days after

the notice of disallowance was received by the county clerk of *Green Lake County*. The papers were transmitted to the circuit court for Eau Claire county, and upon motion judgment of the court was entered dismissing the appeal, and from the judgment so entered plaintiff appeals.

For the appellant there was a brief by *Philip Lehner* of Princeton, district attorney of Green Lake county, and *W. W. Downs* of Glenwood and *Adolph P. Lehner* of Oconto Falls, of counsel, and oral argument by *Philip Lehner*.

For the respondent there was a brief by *John B. Fleming*, corporation counsel, and *A. H. Shoemaker*, of counsel, both of Eau Claire, and oral argument by *Mr. Shoemaker*.

The following opinion was filed March 5, 1918:

ROSENBERRY, J. It is claimed by the plaintiff that by virtue of the provisions of sec. 2822, Stats., the notice of disallowance of the claim having been served by mail as provided in sec. 2821, the time within which an appeal might be taken was doubled, pursuant to the provisions of sec. 2822, and that the notice of appeal was served in time. The procedure in matters relating to claims of one municipality against another for aid furnished to poor persons is prescribed by sec. 1512, Stats. 1917. The part thereof material here is as follows:

"The clerk of any town, city or village disallowing any such claim on the part of a county shall, within the same time and in like manner, give notice of such disallowance and until the same is received by the county clerk the time within which an appeal may be taken from such allowance or an action commenced shall not begin to run. The mailing within such ten days, by the proper officer, of any notice herein provided for, in the manner provided by section 2821 of the statutes, shall be a sufficient service of such notice."

Sec. 25 of ch. VII of the revised charter of the city of *Eau Claire* (Laws 1889, ch. 184) reads as follows:

"When any claim of any person, persons, company or cor-

poration against the city shall be disallowed, in whole or in part by the common council, such person, persons, company or corporation may appeal from the decision of the council disallowing such claim to the circuit court of the county of Eau Claire by causing a written notice of such appeal to be served on the clerk of said city within twenty days after the action of said council in disallowing such claim, and executing a bond to the said city with a sufficient surety, to be approved by the clerk, or a court commissioner of Eau Claire county, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant by the court."

The real question is, of course, Does sec. 2822 apply to appeals taken pursuant to the provisions of the charter of the city of *Eau Claire* in cases within sec. 1512? Secs. 2821 and 2822 are under the title "Proceedings in civil actions in courts of record." Good reasons might be given why this section does not apply. We feel, however, that where possible the statutes should be so construed as to protect the rights of parties in furtherance of justice. While an appeal from the disallowance of a claim by the common council of the city of *Eau Claire* is clearly not a proceeding in a court of record, nevertheless it is the commencement of an action, and the proper way, if not the only way, to proceed against the city, and we think it was the intention of the legislature, in prescribing that notice of disallowance of the claim might be served in the manner prescribed by sec. 2821, that service so made should be followed by the consequences provided in sec. 2822, and that the notice of appeal, therefore, in this case was in time. This seems a natural and reasonable construction, and if it does not conform to the legislative intent the remedy is plain and simple.

It is claimed that *Stevens v. Wheeler,* 43 Wis. 91, rules this case. In that case there was an appeal from an order overruling a demurrer. It does not appear that there was any notice of entry of the order, but on the evening of the

last day for appealing, appellant's attorney mailed a notice of the appeal addressed to the clerk of the circuit court and to the attorneys for the respondent, neither of which was received by the parties to whom they were addressed until some five days later. It may be true as said, that where a statute or rule requires notice of an act done to be given within a limited time there is no time of service to be doubled and the provisions of the section in question are wholly inapplicable. But reading that part of sec. 1512 relating to disallowance of the claim and notice thereof together with sec. 25 of ch. VII of the charter of the city of *Eau Claire,* it is plain that the time within which the appeal must be taken commences to run not from the time the claim is disallowed, but from the time notice thereof is received by the county clerk, and that therefore when notice is given by mail, as in this case, the time within which the appeal may be taken is forty days and not twenty days, in accordance with the provisions of sec. 2822, Stats.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

The following opinion was filed April 30, 1918:

ROSENBERRY, J. The motion for rehearing is based upon two grounds: (1) because sec. 926—100, Stats., is decisive of the question involved, and (2) because sec. 926—100, Stats., is not mentioned in the opinion of the court and was apparently overlooked.

It is thought by the moving party that the decision in this case in effect repeals the provisions of sec. 926—100, where service of notice of the disallowance of a claim is made by registered letter as therein provided. The material provisions of sec. 926—100 are as follows:

"If the claimant be a nonresident the clerk shall transmit such notice by registered letter through the mail. Any time

limited for appeal by the claimant from the determination of his claim by the council, shall begin to run when such notice is served, or when such registered letter is received."

The decision was intended to hold no more than that sec. 2822, Stats., applies to appeals taken pursuant to the provisions of the charter of the city of *Eau Claire* in cases within sec. 1512, Stats. Sec. 1512 prescribes how appeals in cases embraced within its terms shall be taken, how notice of the disallowance of the claim shall be served, and governs in matters of claims filed under that section and appeals taken from the disallowance thereof, and no further. It was not intended to hold, and the decision does not hold, that secs. 2821 and 2822, Stats., have any application to appeals taken pursuant to the provisions of sec. 926—100, except as to cases arising under sec. 1512.

By the Court.—Motion for rehearing denied, without costs.

KITZMAN, Respondent, vs. WERNER, as guardian, imp., Appellant.

February 5—April 30, 1918.

Marriage: Divorce: Effect of final judgment: Right to remarry: Validity of marriage: Epileptics: Public policy: Voidable marriage in another state: Action to affirm: Annulment.

1. Where an interlocutory decree of divorce was properly entered under ch. 323, Laws 1909, the final judgment was properly entered under the regulations of and with the effect provided for in said law of 1909, even though not applied for until after the enactment of ch. 239, Laws 1911 (which provides that the judgment entered in a divorce action, so far as it affects the status of the parties, does not become effective until the expiration of one year from the date of entry). A final judgment of divorce, therefore, entered in 1915, based upon an interlocutory decree properly entered in 1909, left the parties free to marry again without waiting a year.

2. Under sec. 7090, Gen. Stats. Minn. 1913, construed in connection with secs. 7095 and 7106, a marriage contracted by a person who is an epileptic is voidable only, and valid until dissolved by judicial decree.
3. Although a marriage valid where contracted is valid everywhere, it has when properly challenged in a sister state no more immunity from attack than it would have had if the parties, instead of returning to such sister state, had gone on living in the state to which they went to have the ceremony performed and the action had been instituted there.
4. The public policy of Minnesota in prohibiting an epileptic from contracting a lawful marriage cannot be held to have been contrary to the public policy of this state in 1915, since in this state the marriage of insane persons and idiots was then prohibited and, although there is a distinction between epilepsy and insanity, the courts may take judicial notice that epilepsy is a serious mental disease and tends to weaken the power of the afflicted person and to injure his posterity; and especially since, by ch. 218, Laws 1917, the prohibition in this state against marriage has been extended so as to apply to epileptics.
5. The state has the right to control and regulate by reasonable laws the marriage relationship of its citizens, and the wishes and desires or even immediate welfare of the individual must yield to the public welfare as determined by the public policy of the state. Hence, in an action properly involving the question of the validity of a marriage, the duty of the court in deciding that question is not altered by the expressed wishes of the parties.
6. In an action under sec. 2352, Stats., to have a marriage declared valid, where the evidence showed that such marriage was voidable in the state where it was contracted and was not entitled to be recognized as valid under the public policy of this state, the court should have proceeded to annul and declare void such marriage, even though there was no counterclaim, and no desire on defendant's part, to have it annulled.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Reversed.*

The appeal is from a judgment affirming plaintiff's marriage to defendant Otto H. Kitzman.

On September 20, 1909, the plaintiff, then *Bertha G. Hanson,* obtained an interlocutory decree of divorce in an

action in the circuit court for Eau Claire county against her then husband, Harry Hanson.

March 26, 1914, proceedings were commenced in the county court of Eau Claire county for the appointment of a guardian for the defendant herein, Otto H. Kitzman, on the ground of his excessive drinking, and a copy of such petition and the order made thereon were properly filed with the register of deeds of said county on the following day. April 21, 1914, *Frank Werner,* defendant and appellant herein, was appointed guardian of said Otto H. Kitzman in such proceedings and has remained such ever since. In September, 1914, the plaintiff and the defendant Otto H. Kitzman made application to the county clerk of Eau Claire county for a marriage license, but were refused such. July 30, 1915, the plaintiff filed a petition in the divorce action between herself and Harry Hanson praying that a final judgment may be rendered in that court pursuant to ch. 323 (*sic*) of the Laws of 1911, and for such other and further order, judgment, and relief as to the court may seem necessary and proper in connection therewith, and on the same day a final judgment was rendered in said action reciting that more than one year had elapsed since the rendition and filing of the interlocutory decree mentioned above and adjudging that the bonds of matrimony theretofore existing between the parties be and the same were thereby wholly dissolved. August 13, 1915, another application was made to the county clerk of Eau Claire county for a marriage license and it was again refused. On September 27th of the same year the plaintiff and defendant Kitzman went to the city of St. Paul, Minnesota, and there obtained a license to marry, and before a justice of the peace in the state of Minnesota had a marriage ceremony performed and received a marriage certificate from such justice in the proper form. They returned to Eau Claire on the same day and have lived together as husband and wife since October 11th on the farm owned by defendant Otto.

In May, 1916, *Bertha G. Kitzman* as plaintiff commenced this action against the defendants asking that proceedings then pending on an application made by defendant *Frank Werner* for the commitment of defendant Otto H. Kitzman to the county insane asylum be stayed and that the said marriage ceremony of September 27, 1915, be declared a valid marriage.

The defendant *Frank Werner,* as guardian of the said Otto H. Kitzman, interposed an answer in substance denying that there was a lawful marriage between the plaintiff and defendant Kitzman, and by way of counterclaim that by reason of prohibitions contained in the laws of the state of Wisconsin both the plaintiff and the defendant Otto H. Kitzman were prohibited and incapacitated from entering into the marriage relationship, and further that by reason of certain statutes of the state of Minnesota in force September, 1915, the alleged marriage between them was prohibited and void, and praying that the complaint be dismissed on the merits and that judgment be entered declaring the alleged marriage of September 27, 1915, to be null and void.

The ages of the plaintiff and defendant at the time of trial appeared to be about fifty and fifty-nine years respectively. Defendant Kitzman possessed property worth between $7,000 and $10,000, and plaintiff has been dependent upon her own labor for support.

Upon the trial of the action the court made findings establishing as facts the records and proceedings that have been recited above, and that during the period of ten years preceding such trial "the defendant Otto H. Kitzman has been subject to occasional attacks of epilepsy which rendered him insensible at the time of such attacks and somewhat irrational for some hours thereafter; that said epileptic condition was caused by the excessive use of alcohol; that at the time of the trial he was entirely rational and exhibited no mental abnormality except that his memory on certain subjects on which his mind had not been recently refreshed was

quite defective; that at the time of his marriage to the plaintiff he fully understood the nature of the transaction and was not then and is not now insane;" and found as conclusions of law that there was no prohibition, either under the laws of the state of Wisconsin or the laws of Minnesota, to the marriage of September, 1915, and that such marriage was valid. From the judgment entered in accordance with such findings the defendant *Frank Werner,* as guardian, has appealed.

Fred Arnold of Eau Claire, for the appellant.

A. C. Larson of Eau Claire, for the respondent.

The following opinion was filed March 5, 1918:

ESCHWEILER, J. The plaintiff contends that having obtained an interlocutory decree of divorce from her then husband, Harry Hanson, September 20, 1909, under the statutes as amended by the laws of that year, her status as it related to her right to again marry became thereby fixed and determined, so that the two conditions required under that law, viz. of the elapsing of one year from the entry of the interlocutory decree and the entry of final decree in July, 1915, being complied with, left her then forthwith free to remarry, even though in the interim between such interlocutory and final decrees the law had been amended by ch. 239 of the Laws of 1911.

The appellant guardian contends that by sec. 2330, Stats., as it stood in September, 1915, and then reading, so far as material here, as follows: "Section 2330. 1. No marriage shall be contracted while either of the parties has a husband or wife living, . . . and no insane person or idiot shall be capable of contracting marriage," in connection with then existing sec. 2374, providing that the judgment entered in a divorce action, so far as it affects the status of the parties, does not become effective until the expiration of one year from the date of the entry of such judgment, placed a pro-

hibition upon any marriage by plaintiff until the specified one year had elapsed from and after the entry of the judgment of July, 1915.

The substantial changes wrought in the laws of this state regulating marriage and divorce by the amendments here involved and created by ch. 323, Laws 1909, and ch. 239, Laws 1911, were so fully pointed out and discussed in the case of *Dallmann v. Dallmann,* 159 Wis. 480, 149 N. W. 137, that we deem it unnecessary to go over the same subject again. The effect of the decision in that case was to hold, and we do now hold, that an interlocutory decree of divorce, properly entered under the provisions of ch. 323 of the Laws of 1909, so fixed the status of the parties to the same as to their right to again marry that after the expiration of one year from the entry of such interlocutory decree and upon the entry of such a final decree as is provided for in said ch. 323, the prohibition against again marrying is forthwith lifted, even though such final judgment is not obtained until after ch. 239, Laws 1911, had been enacted. In other words, that when an interlocutory decree was properly entered under the provisions of ch. 323, Laws 1909, the final and terminating adjudication in such divorce action can and should be made under the regulations of and with the effect provided for in that ch. 323, Laws 1909, even though such final judgment be not applied for until after ch. 239, Laws 1911, went into effect.

This means that the trial court was right in holding that plaintiff was not in September, 1915, the wife of Harry Hanson and therefore was not within the prohibition of sec. 2330, Stats.

Sec. 7090, Gen. Stats. Minn. 1913 (formerly sec. 3554), and in force in September, 1915, read as follows:

"*Marriages prohibited.* No marriage shall be contracted while either of the parties has a husband or wife living; nor within six months after either has been divorced from a

former spouse; nor between parties who are nearer of kin than second cousins, whether of the half or whole blood, computed by the rules of the civil law; nor between persons either one of whom is epileptic, imbecile, feeble-minded or insane."

By ch. 234 of the Laws of Minnesota for the year 1901 this express prohibition against marriage being contracted by epileptics or insane persons was first incorporated into its laws and such express prohibition has ever since then been the public policy of that state.

In Minnesota a license is a prerequisite for a marriage ceremony. Such a license in due form was obtained in this case, is in the record here, and it certifies that the clerk of the district court, the official authorized to issue it under sec. 7095, Gen. Stats. Minn. 1913, was satisfied by the oath of the defendant Kitzman that there were no legal impediments to such proposed marriage.

Defendant Kitzman was at that time an epileptic and had suffered an unmistakably characteristic epileptic fit two days before the ceremony. If those facts had been communicated to the clerk issuing such certificate it would have been his duty to have refused such license; or if to the justice of the peace, his duty would have been to refuse to act, because such proposed ceremony would have been clearly within the prohibition of the Minnesota statute quoted above, sec. 7090, and contrary to the public policy of that state.

By sec. 7106, Gen. Stats. Minn. 1913, it was provided that marriages prohibited by law on account of consanguinity, or on account of either party having a former husband or wife then living, if solemnized within that state, shall be absolutely void without any legal proceedings. Marriages attempted to be contracted contrary to other statutory prohibitions than those two so specified are voidable only, and valid until dissolved by judicial decree. *State v. Yoder,* 113 Minn. 503, 130 N. W. 10. The marriage ceremony,

therefore, in September, 1915, to which defendant Otto H. Kitzman was a party must be considered under the laws of the state of Minnesota, where it was performed, as voidable merely and not void.

The general proposition that a marriage valid where contracted is valid everywhere (*Hall v. Industrial Comm.* 165 Wis. 364, 162 N. W. 312) carries with it as a necessary corollary the further proposition that such marriage comes into a sister jurisdiction with all its inherent infirmities as well as strength. It can acquire no greater sanctity or impregnability by such removal than it had where solemnized. When properly challenged here it can have acquired, by reason of the parties returning to this state to live, no more immunity from attack than it would have had if they, from the time of the ceremony and thereafter, had lived in Minnesota and the action was there instituted.

This marriage in Minnesota was solemnized contrary to the express prohibition of the statutes of that state and contrary to its public policy. It was solemnized there after a fraud upon the clerk of the district court, in his duty to ascertain and to be satisfied that there was no legal impediment to such marriage, had been perpetrated, either by the concealment by or false statement of the defendant Kitzman as to his condition on a material and statutory requirement.

It could not properly be held that the public policy of Minnesota, in prohibiting an epileptic from contracting a lawful marriage, was contrary or repugnant to the then public policy of this state, inasmuch as this state then prohibited the marriage of insane persons and idiots; for although there is a distinction both in the legal and medical sciences between epilepsy and insanity (*Oborn v. State,* 143 Wis. 249, 276, 126 N. W. 737), yet the court may properly take judicial notice that epilepsy is a serious mental disease and tends to weaken the power of the afflicted person and to injure his posterity. *Gould v. Gould,* 78 Conn. 242, 61 Atl.

604, 2 L. R. A. N. S. 531. We should be loath to declare, if not indeed prevented from declaring, that such a prohibition by Minnesota was contrary to the public policy of this state, in view of the fact that by ch. 218, Laws 1917, the legislature amended that portion of sec. 2330, Stats., above quoted, by inserting the word "epileptic" between the words "person" and "or" in the last sentence thereof.

The marriage ceremony, therefore, which plaintiff has asked the courts of this state to confirm in this action was, when performed, contrary to the public policy of the state resorted to by the plaintiff for the sole purpose of performing the ceremony, and we shall give it no higher value here than it had there.

The mere fact that the unfortunate defendant Otto H. Kitzman, when examined as a witness in the court below, expressed himself as opposed to the action taken by his guardian and indicated his desire of having such ceremony confirmed and the relationship continued, does not alter the situation nor change the duty of the court in disposing of the case.

The state has the right to control and regulate by reasonable laws the marriage relationship of its citizens, and the wishes and desires, or even immediate welfare, of the individual must yield to the public welfare as determined by the public policy of the state. *Andrews v. Andrews,* 188 U. S. 14, 30, 23 Sup. Ct. 237; *Peterson v. Widule,* 157 Wis. 641, 147 N. W. 966; *Maynard v. Hill,* 125 U. S. 190, 8 Sup. Ct. 723.

The plaintiff brought this action in evident reliance upon sec. 2352, Stats., reading as follows:

"When the validity of any marriage shall be denied or doubted by either of the parties the other party may commence an action to affirm the marriage, and the judgment in such action shall declare such marriage valid or annul the same, and be conclusive upon all persons concerned."

The plaintiff having herself come and having brought the

defendant Kitzman into court under this statute, it follows that when, as here, the facts do not warrant the court in declaring such an alleged marriage a valid marriage, it must proceed further and not merely, as in ordinary cases, dismiss the plaintiff out of court, but must declare such pretended, denied, or doubted marriage void and annulled. There is no half way recognized. It is therefore immaterial whether there is a counterclaim interposed praying for such annulment as against plaintiff's prayer for affirmance or that the defendant should in any way move the court to act. On such questions the state itself is interested in seeing, on its own behalf, that the status of those who claim to be married shall be definitely determined so that there shall not be within its borders, with its knowledge and sanction, those who are dwelling within a matrimonial twilight zone.

It follows from what has been said that the trial court should have declared that the marriage ceremony of September 27, 1915, between the plaintiff and defendant Otto H. Kitzman was against the prohibition of the Minnesota statute; was contrary to the public policy of that state; was entered into after concealment or misrepresentation of a material fact had induced the proper official of that state to issue a requisite marriage certificate; and that such violations of the public policy and statutes of Minnesota were of such nature that the pretended ceremony could create no matrimonial status entitled to be recognized as such within the public policy of this state, and such attempted marriage, therefore, should have been declared null and void.

This disposition of the case renders it unnecessary to discuss or consider other questions presented on this appeal.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with instructions to that court to enter judgment declaring the marriage ceremony between the plaintiff and the defendant Otto H. Kitzman null and void; the defendant *Frank Werner,* as guardian,

to have his costs and disbursements in this court and in the court below.

A motion for a rehearing was denied, without costs, except clerk's fees, on April 30, 1918.

ROBERTS, Respondent, vs. GOODLAD and others, imp., Appellants.

February 8—April 30, 1918.

Real-estate brokers: Unauthorized employment: Liability for commission: Written contract: Contemporaneous oral agreement: Evidence.

1. Three brothers who, without authority, assumed to act for other brothers and sisters in employing a real-estate broker to sell a farm belonging to them all, were personally liable for the whole commission of the broker, where his employment was not assented to or ratified by the others.
2. A finding by the jury that after defendants had made a written contract with a broker it was agreed orally that he should receive a commission larger than that stated in the writing, is *held* not to be sustained by the evidence, which showed only loose or casual talk between the broker and one of the defendants, practically contemporaneous with the writing.

APPEAL from a judgment of the county court of Iowa county: ALDRO JENKS, Judge. *Modified and affirmed.*

Action by a real-estate agent to recover commissions for finding a purchaser of a farm of 290 acres. The action was tried before a jury. It appeared that the farm was owned by ten brothers and sisters (adults) subject to the dower and homestead rights of their mother, Mary Goodlad. Three of the brothers (the appellants here) made a written agreement with the plaintiff January 11, 1916, in which they agreed, on behalf of themselves and the other owners, that the plaintiff should have the exclusive sale of the farm at the

price of $16,000, of which $1,500 was to be in cash and the balance in specified deferred payments, plaintiff to receive a commission of three per cent. for his services. The plaintiff claims that immediately after this written agreement was executed an oral agreement was made between himself and the three appellants (acting for all the owners) by which it was agreed that the plaintiff, in addition to the three per cent., should have as commission all money or property received on the sale in excess of $16,000.

Through the efforts of the plaintiff a purchaser of the farm was found in the person of one Thomas, to whom the owners sold the farm on contract for $18,000, of which sum $2,500 was represented by a house and lot traded in.

The jury returned the following special verdict:

"After the written agreement of January 11, 1916, was made and entered into, was it agreed between the plaintiff and the defendants *Richard Goodlad, C. H. Goodlad,* and *Ernest Goodlad,* that the plaintiff, in addition to the commission of three per cent. provided for in the written contract, should also have as compensation for making a sale of the Goodlad farm all moneys or property received on such sale in excess of $16,000? *A.* Yes.

"After the defendants, *Richard Goodlad, C. H. Goodlad,* and *Ernest Goodlad,* had employed the plaintiff to find a purchaser for the Goodlad farm, they assuming to act on behalf of all the owners thereof, was such employment of the plaintiff communicated by them or some of them to the other defendants herein and assented to and ratified by them? *A.* No.

"Was the Goodlad farm sold by the defendants to William H. Thomas for the sum of $18,000 by and through the acts and services of the plaintiff in procuring him as a purchaser thereof? *A.* Yes."

Judgment was rendered against the three defendants who signed the written contract for $2,480, and the action was dismissed as to the remaining defendants, whereupon the three defendants aforesaid appealed.

F. K. Shuttleworth of Madison, for the appellants.

For the respondent there was a brief by *Gilbert & Ela* of Madison, and oral argument by *F. L. Gilbert.*

The following opinion was filed March 5, 1918:

WINSLOW, C. J. There can be no question as to the plaintiff's right to recover from the appellants the three per cent. commission named in the written contract. The three appellants signed this contract not only on their own behalf, but representing themselves to be authorized to sign it on behalf of the other owners, and the jury have found, on the contrary, that they had no authority to act for their co-owners. Under these circumstances they are personally liable for the commission. *Oliver v. Morawetz,* 97 Wis. 332, 72 N. W. 877. As to the $2,000 additional commission we have had much difficulty.

The evidence which is supposed to support the first answer of the special verdict is principally the evidence of the plaintiff himself. He testified to meeting the three appellants in McGilligan's saloon at Madison, January 11, 1916, and to the making of the written agreement before mentioned, and then testified that, after that agreement was signed, "I spoke to the boys, and I said if somebody has some property to trade in would you take the property? They said, 'No, we won't take a cent in trade, we will give you three per cent., we don't care what you get, you can get $20,000. All we want is the $16,000.' "

Upon cross-examination he testified in substance with reference to this conversation as follows:

"After that [the contract] was written I spoke to them about trading in property as part payment for the farm. *I considered it part of the contract* that if I traded for anything, took anything in trade, in order to make the deal, they said I had to take the property I got in trade, and I said I would. I said that to *C. H.* [one of the brothers]. I don't know where *Ernest* was at this time, he may have been

around there. *C. H.* talked to me more about it than all the rest. *I couldn't say whether this was a conversation I had with C. H. alone, others were near.* This conversation was with *C. H.* I was talking direct to him and he direct to me: that was all the talking that was being done."

The only other evidence with regard to this alleged conversation was that of McGilligan, who testified that he heard a conversation after the contract was signed, and proceeded to give the conversation as follows:

"The only thing I heard said was, *Herbert Goodlad* [meaning *C. H.*], while he had a cigar he said he didn't care if he got $20,000, he didn't care for any stuff in trade.

"*Q.* You didn't care who got it?

"*A.* No, *Roberts.* He didn't care what he got over $16,000; he didn't want anything in trade. That was all I heard said; they was having a cigar then after getting up from the table."

The appellants deny that any such conversation was had. We do not think there is sufficient foundation here to sustain a finding that an independent oral contract was made after the signing of the written contract, and this for four reasons, viz.: (1) The evidence as to the terms of the supposed oral contract is decidedly vague and unsatisfactory, and there can be no reasonable certainty as to what the language testified to meant when used: the subject under discussion was evidently the taking of property instead of cash and not the amount of the plaintiff's commission; (2) the supposed oral contract bears every evidence of being mere loose talk: it seems quite beyond the reasonable bounds of belief that the parties, after having carefully set down in exact terms an agreement covering the whole subject, should at the same interview and practically at the same time, in a few casual words, make a new and different contract of such grave import and leave the written contract on which the ink was hardly dry still in existence without attempt to change or recall it; (3) the conversation, by the plaintiff's own admis-

sion, was only with one of the appellants, and the plaintiff is unable to say that the others heard it or took part in it; (4) the alleged conversation was practically contemporaneous with the writing; both occurred at the same continuous interview with apparently no interval between. The plaintiff himself says: "I considered it a part of the contract" (*i. e.* the arrangement that if anything was taken in trade the plaintiff would have to take it). He evidently did not consider that there were two contracts, and we are of opinion that the evidence conclusively shows that there was in fact but one contract which was reduced to writing and which is not to be varied or contradicted by evidence of remarks or offers or inconsistent contemporaneous oral statements.

By the Court.—Judgment modified by deducting therefrom as of its date the sum of $2,000, and as so modified affirmed, with costs to the appellants.

Upon a motion by the respondent for a rehearing it was contended, *inter alia,* that he was entitled, at least, to a commission of three per cent. on $18,000, which would be $540.

On April 30, 1918, the mandate of this court was modified so as to read as follows:

Judgment modified by deducting therefrom as of its date the sum of $1,940, and as so modified affirmed, with costs to the appellants.

In all other respects the motion for rehearing was denied, without costs, except clerk's fees.

WHITE, Respondent, vs. BROTHERHOOD LOCOMOTIVE FIREMEN AND ENGINEMEN, Appellant.

March 5—April 30, 1918.

Life insurance: Benefit societies: Assessments paid after death of member: Recovery: Parties interested: Limitation of actions: Interest.

1. A member of the defendant benefit society disappeared in 1901 and was not thereafter heard from, and it is established that he died in 1901. In the mistaken belief that he was still living his mother, the beneficiary, continued to pay the assessments on his benefit certificate until her death in 1904, and thereafter such assessments were paid by his heirs until 1915, when this action was brought by one of said heirs (who was also assignee of the other heir) to recover the assessments so paid by them. It appearing that defendant's officers, with full knowledge of the facts as to the member's disappearance, had advised said continued payment of the assessments, and that both parties considered and treated the benefit certificate as valid up to November 19, 1914, when defendant rejected a demand for payment thereon, it is *held* that the assessments so paid by the heirs may be recovered.
2. Neither the estate of the deceased member nor that of the beneficiary is interested in the claim for recovery of the assessments so paid by the member's heirs.
3. The certificate having been kept alive and treated as valid by both parties until November 19, 1914, no cause of action for recovery on the certificate or of the assessments paid after the death of the insured accrued until the rejection by defendant of the demand made on that date; and the action is therefore not barred by the statutes of limitation.
4. Interest on the amount of the assessments for which recovery is had in such action should be allowed only from November 19, 1914.

APPEAL from a judgment of the circuit court for Sauk county: JAMES O'NEILL, Judge. *Modified and affirmed.*

This is an action to recover assessments paid on a benefit certificate in the appellant organization issued to one T. J. White, which were paid by the plaintiff and her sister, Mar-

garet Nichols, since the death of T. J. White and since the death of the beneficiary, his mother, Ellen White.

An action to recover on this benefit certificate has been before this court and is reported in 165 Wis. 418, 162 N. W. 441. In that action recovery of the amount of the policy and of the premiums paid by the beneficiary after the disappearance of the insured, T. J. White, to the time of her own death was adjudged. The trial court found that T. J. White died in July, 1901.

The complaint in this action alleges, as was alleged in the former complaint, the disappearance and death of White, and asks for a judgment for recovery of the assessments made by the defendant association and paid by respondent and her sister, Margaret Nichols, on this certificate from the death of their mother, the beneficiary, up to the time of the commencement of this action in December, 1915. Respondent alleges that she and her sister were induced to keep paying the assessments upon the representations made to them by officers of the local lodge that the policy would be kept in force, upon payment of the assessments and dues, until they received knowledge whether or not T. J. White was dead.

The association alleges that any and all premiums which were paid by the plaintiff and her assignor were paid voluntarily for the purpose of keeping in force the certificate so that when the death of the insured was in fact proven the amount of the certificate might be received by the beneficiary or her heirs; that the premiums were paid in the usual and regular manner; that the plaintiff and her sister were fully informed of the conditions and circumstances surrounding the disappearance of T. J. White, and that, fully cognizant of these facts, they continued to pay these premiums for the purpose of keeping valid the certificate so that a recovery of the amount could be had by them.

Defendant alleges that plaintiff's right to recover herein is barred by sec. 4222, Stats., that since the time of com-

mencement of this action and since the joining of issue upon the original answer the judgment of the circuit court referred to in these pleadings was affirmed by the supreme court and that all costs have been fully paid, and that the amounts thus paid include any and all dues and assessments which were paid on the policy up to the time of the death of the beneficiary, Ellen White, and by reason thereof this plaintiff has no cause of action; and that the cause of action was not instituted within the time required by the constitution and by-laws of the association nor by the certificates of insurance set forth and referred to in plaintiff's complaint bearing date of February 18, 1901, and January 1, 1907.

Upon service of the complaint there was a demurrer to plaintiff's capacity to sue and as to its sufficiency, which was overruled by the court and exception taken. There was likewise a demurrer *ore tenus* before the introduction of any testimony, which was overruled and exception duly taken.

The court ordered judgment in favor of the plaintiff for the sum of $301.97 damages, together with the sum of $38.52 costs. This is an appeal from such judgment.

For the appellant there was a brief by *Bentley, Kelley & Hill* of Baraboo, and oral argument by *Frank R. Bentley.*

For the respondent there was a brief by *Grotophorst, Thomas, Rieser & Quale* of Baraboo, and oral argument by *H. H. Thomas.*

SIEBECKER, J. This action for recovering the amounts of assessments plaintiff and her assignor paid on the benefit certificate of Thomas J. White, deceased, is one to recover the sums paid to the defendant under the mistaken belief that White was living when the assessments were levied, demanded, and paid. It is established that White died in 1901, and that the right to levy assessments against him as member of the *Brotherhood* ceased at that time. Under these circumstances it was held in *White v. Brotherhood of*

Locomotive Firemen, 165 Wis. 418, 162 N. W. 441, that the party paying such assessments after White's death was entitled to reimbursement. We are persuaded that this decision should be adhered to as a proper determination of this question. It follows from this that the plaintiff is entitled to maintain this action in its present form and that the estates of Thomas J. White and Ellen White, the beneficiary named in the certificate, are not interested in this claim. It was found and determined in the *White Case,* and the trial court in this case reiterates the finding, that the officers of the *Brotherhood* had as full knowledge of the facts of White's disappearance as had the plaintiff and her mother, who paid these assessments. The trial court determined in this case, as was held in the former case, "that the officers of the lodge advised plaintiffs to continue payment of the dues and assessments upon the certificate, which was done. Both parties considered the contract valid up to the time action was commenced, and the defendant, therefore, should not be permitted to repudiate it under the established facts in the case." It is now argued that the right to recover on the contract does not prevent the statutes of limitation from running against payments of assessments from the date they were made. The logic of this contention would prevent recovery of assessments or premiums paid under our statutes on any life insurance contracts when the insured disappears, without tidings of his whereabouts, if they were made more than six years before the commencement of action and after the death of the insured. A period of seven years after last tidings is required to raise a legal presumption of death in such cases. It is readily conceivable that the insured may actually have died at the time of his disappearance but that the fact of death did not become known for more than six years thereafter. It is reasonably to be expected that the insurer and the beneficiary, under the facts and circumstances surrounding the disappearance of an insured person, might

desire to keep the policy alive beyond the seven-year period upon which a presumption of death may be claimed. We discover no valid reasons why the insurance contract cannot, by agreement with the insurer, be continued in force as a subsisting and valid one beyond the seven-year period. This conclusion, we think, was properly adopted and sustained in the *White Case, supra.* Since the contract of insurance can be so treated by the parties, no cause of action can accrue for recovery of premiums and assessments paid thereon after death of the person insured until the contract is terminated by either party. Applying these considerations in the instant case, it follows that the defendant and the plaintiff and her sister by mutual arrangement treated the certificate as valid up to the time the plaintiff declared it due and demanded payment of the proceeds thereof and repayment of the assessments and defendant's rejection of the demand on November 19, 1914; and that no action for recovery on the policy and of the assessments paid after the death of Thomas J. White in 1901 accrued until such demand was rejected by the defendant. Under these circumstances plaintiff's cause of action is not barred by the statutes of limitation.

The trial court allowed interest to plaintiff from the date of the payment of the several assessments for which recovery is awarded in this action. This we consider to be erroneous. Interest should be allowed on the sum of the assessments paid only from November 19, 1914. The amount of interest allowed by the court is $92.52. The proper amount is $36.32. The judgment should be modified, therefore, by deducting the sum of $56.20, leaving the sum of $245.77 as the correct amount of recovery. As so modified the judgment stands affirmed.

By the Court.—It is so ordered, the appellant to recover costs in this court.

DAVIS, Respondent, vs. ESTATE OF DAVIS and others, Appellants.

March 6—April 30, 1918.

Husband and wife: Barring dower for adultery: Ancient statute not in force: Divorce.

1. **The Statute of Westminster 2 (13 Edward I. ch. 34), under which a husband could bar his wife's dower in case she voluntarily left him to live in adultery with another and he did not willingly reconcile her, is not in force in Wisconsin. An adequate and broader remedy having been provided by our statutes which make a single act of adultery on the wife's part a cause for divorce from the bonds of matrimony and make such a divorce a bar to dower, it must be deemed that such legislation is exclusive and "suspended" the ancient statute, within the meaning of sec. 13, art. XIV, Const.**
2. **The fact that a husband, for religious or other reasons, does not wish to avail himself of the remedy given him by law and divorce his wife, cannot give present efficacy to the superseded remedy.**

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Polk county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Action for the assignment of dower and for widow's allowance under the law. Levi Davis, a resident of Polk county, Wisconsin, died testate on September 8, 1914. Letters testamentary were issued to *Harris,* the executor therein. The respondent, claiming to be the widow of the deceased, filed in the county court her election to take the provisions made for her by law and petitioned that her dower be assigned to her. The county court found as facts:

"That on the 19th day of March, 1871, the decedent, Levi Davis, and the said petitioner, *Naomi Davis,* were married at the city of Fort Wayne, in Allen county, Indiana; that sometime in the month of June, 1871, the said *Naomi Davis* abandoned the said Levi Davis and departed from his home and ever since has lived separate and apart from him; that in 1874 a child was born to said *Naomi Davis* begotten by

one Solomon Watson; that in the month of July, 1877, she entered into a marriage with one Walton Bradfield at Payne, Ohio, without having been divorced from said Levi Davis, and ever since that time until the death of said Walton Bradfield on the 1st day of February, 1914, lived with him as his wife; that as the issue of said supposed marriage were born nine children; that the said *Naomi Davis* never made any effort to ascertain whether or not the said Levi Davis was yet living when she entered into the marriage relation with said Walton Bradfield."

As conclusions of law it held that *Naomi Davis* and Levi Davis were husband and wife up to the death of the latter, but that owing to her adultery *Naomi Davis* was not entitled to dower or to a widow's allowance. Upon appeal to the circuit court it was stipulated that the facts found by the county court should be the facts in the case. The circuit court held that as the widow of Levi Davis *Naomi Davis* was entitled to dower and her widow's allowance under the law, and judgment was entered accordingly. From this judgment the executor and devisees of the deceased appealed.

The cause was submitted for the appellants on the brief of *Morris E. Yager* of Frederic, and for the respondent on that of *Kennedy & Yates* of Amery.

VINJE, J. Sec. 13, art. XIV, of our constitution provides that

"Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of the state until altered or suspended by the legislature."

This constitutional provision is invoked by appellants to sustain the contentions that ch. 34 of 13 Edw. I., enacted in 1285 and called the Statute of Westminster 2, is in force in Wisconsin. The statute reads:

"And if a wife willingly leave her husband, and go away, and continue with her advouterer, she shall be barred for every of action to demand her dower, that she ought to have

of her husband's lands, if she be convict thereupon, except that her husband willingly, and without coertion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action."

The reason for the enactment of such a statute was that under the common law of England adultery was not a cause for divorce, and a husband whose wife was guilty had no remedy to bar her of her dower rights. This statute gave him a remedy in case his wife voluntarily left him to live in adultery with another and he did not willingly reconcile her.

The question arises whether our legislation upon the subject of dower has superseded this ancient statute by enactments which must be deemed to stand in lieu thereof. If our statutes provide substantially the same or similar adequate remedies to the husband and are as broad or broader in their scope than the old statute, then it must be deemed suspended by the legislature within the meaning of the constitutional provision quoted. But if our legislation cannot be held to stand in lieu of the old statute or to have altered it, then it forms a part of the law of the state. *Huber v. Merkel,* 117 Wis. 355, 364, 94 N. W. 354.

The Territorial Statutes of 1839, p. 140, § 5, provide:

"That a wife being a defendant, [in an action for divorce] and convicted of adultery as aforesaid, shall not be entitled to dower in the husband's real estate, or any part thereof, nor to any distributive share in his personal estate on his dying intestate."

The Revised Statutes of 1849, p. 397, ch. 79, sec. 25, contain this provision:

"When the marriage shall be dissolved by the husband being sentenced to imprisonment for life, and when a divorce shall be decreed for the cause of adultery committed by the husband, or on account of his being sentenced to imprisonment for a term of three years or more, the wife shall be entitled to her dower in his lands, in the same manner as if he

were dead; but she shall not be entitled to dower in any other case of divorce."

This was re-enacted as sec. 25, ch. 111, p. 626, of the Revised Statutes of 1858. In the Revised Statutes of 1878, sec. 2373, it was modified to read:

"When a marriage shall be dissolved by the husband being sentenced to imprisonment for life, the wife shall be entitled to her dower in his lands in the same manner as if he were dead; but she shall not be entitled to dower in any other case of divorce from the bond of matrimony."

The statute of 1898 left this section intact and it remained so until 1909, when by sec. 7 of ch. 323 it was amended to read:

"When a marriage shall be dissolved by the granting of a decree of divorce from the bonds of matrimony, the wife shall not be entitled to dower in any lands of the husband."

Such has been the law since. Adultery has been a cause for divorce from the bonds of matrimony both before and ever since the organization of the state. See § 1, p. 140, Terr. Stats. 1839, and sec. 2356, Stats. 1917, and notes.

We see, therefore, that our statutes have provided an adequate and broader remedy to the husband than did the Statute of Westminster 2. Under that he could bar his wife's dower only in case she voluntarily left him and willingly lived in adultery with another and in case he did not reconcile her. Under our statutes a single act of adultery on her part is cause for divorce from the bonds of matrimony, and such a decree bars her dower. That a husband, for religious or other reasons, may not desire to avail himself of the remedy given him by law and divorce his wife, is no reason why the rights and obligations flowing from a continuance of the marital relation should be abrogated and ancient remedies substituted therefor. The law gives him a remedy. It is optional with him to use it or not. Since our legislation has given adequate and broader remedies than that afforded

by the English statute and has prescribed how statutory bars to dower on the ground of adultery may be made effective, it must be deemed that such legislation suspends the old statute and is exclusive on the subject. The fact that where a divorce is granted on the ground of the wife's adultery the court may, in its discretion, give her a portion of the husband's estate, as declared in *Pfingsten v. Pfingsten,* 164 Wis. 308, 159 N. W. 921, does not affect the question of barring her dower. The latter is barred as effectually where a portion of his estate is given her as where she gets nothing.

The same result was reached in *Lakin v. Lakin,* 2 Allen (84 Mass.) 45, and in *Bryan v. Batcheller,* 6 R. I. 543, 78 Am. Dec. 454, on practically the same grounds. In New York the statute was substantially re-enacted in 1787, but was repealed in 1830. 2 Scribner, Dower (2d ed.) 536. It appears, though, to be referred to in *Schiffer v. Pruden,* 64 N. Y. 47, as though applicable to a case coming within it and not controlled by state statutes.

In many states where it has been held that there are no specific statutory enactments covering in substance the provisions of the English statute the latter has been declared to constitute the law of the state. 9 Ruling Case Law, 605; 2 Scribner, Dower (2d ed.) 531 *et seq.;* 14 Cyc. 933; *Bell v. Nealy,* 1 Bailey, L. (S. C.) 312, 19 Am. Dec. 686; *Daniels v. Taylor,* 145 Fed. 169. It also seems to be in force in Pennsylvania (*Reel v. Elder,* 62 Pa. St. 308) and in New Hampshire (*Cogswell v. Tibbetts,* 3 N. H. 41).

Much as the court in this case might desire to find a lawful bar to the dower rights of the petitioner, who from an equitable point of view does not deserve charitable consideration, it is not deemed to be within its province to engraft upon our jurisprudence exceptions where the legislature has covered the subject and made none. It is to be observed also that the deceased had it within his power ever since his wife abandoned him to bar her dower by an action of divorce on the ground of adultery. He did not see fit to do so, for

reasons not known to us. Whatever they may have been, the only inference we can draw from his conduct is that he did not wish to sever the relation of husband and wife. At any rate he did not sever such relation. Not having done so, she remained his wife during his lifetime and became his widow upon his death with all the legal rights attaching to such relation.

By the Court.—Judgment affirmed.

The following opinion was filed May 20, 1918:

ESCHWEILER, J. (*dissenting*). I think the claimant should be held to be barred of her dower by the rule of the common law and also as having been waived by her own deliberate act and the judgment be reversed.

The principle of the common law as amended by the Statute of Westminster and by which an adulteress, by continued absence from her husband, lost her dower, was in existence at the time of our Revolution, was suitable to our condition, and clearly in harmony with our constitution and statutes, and is therefore still a part of the common law of this country. Sec. 13, art. XIV, Const.; *Will of Rice,* 150 Wis. 401, 445, 136 N. W. 956, 137 N. W. 778; *Harrigan v. Gilchrist,* 121 Wis. 127, 219, 99 N. W. 909.

The mere giving of an additional remedy such as is given in the divorce action ought not to be considered as an abrogation of such a common-law principle. The divorce proceedings require some affirmative action by the husband in order to divest the wife of her inchoate right of dower. The common law deprives the wife of the same inchoate right of dower by reason of her own action and without requiring any proceedings by the husband. These two do not appear to me to be in any way inconsistent, or the one a substitute for the other. Nor should he be driven to the one by anything short of a legislative destruction of the other.

The reasoning of Justice VAN DEVANTER in *Daniels v.*

Taylor, 145 Fed. 169, holding that the same Statute of Westminster is a part of the common law in effect in the state of Arkansas, might be better followed than the Massachusetts case cited in the majority opinion.

In this state the barring of dower does not depend solely on statutory provisions. It may be lost by silence when justice required speech, thereby creating an estoppel. *H. W. Wright L. Co. v. McCord,* 145 Wis. 93, 128 N. W. 873. And surely estoppel comes to us through the common law. Coke, Litt. 352*a*.

A married woman may lose a known valuable right by waiver or relinquishment. *Somers v. Germania Nat. Bank,* 152 Wis. 210, 138 N. W. 713.

In this case her right was based solely upon the marriage relationship. That it was a known right is quite apparent from the filing of her claim in the month of July following his death. Knowingly she voluntarily abandoned all the relative duties and obligations on her part and lived away from her husband from 1871 until his death in September, 1914. During these forty-three years that she "lived her own life" as the saying is, she bore ten children begotten by others than the deceased. Such an accumulation of cumulative repudiations of the marital obligations ought to require a judicial declaration that her repudiation thereof was entire and absolute.

The faithless ought not now to be rewarded as though faithful.

HANSON and others vs. CHICAGO & LAKE SUPERIOR RAILWAY COMPANY and others, Respondents: CENTRAL LOCOMOTIVE & CAR WORKS, Appellant.

April 3—April 30, 1918.

Appeal: Waiver of right: Acquiescence in order: Acceptance of benefits.

1. A party who intentionally accepts the fruits of an order cannot maintain an appeal therefrom, even though he did not intend to relinquish such right.
2. Where, on petition of the vendor of a railway car, the receiver of the insolvent purchaser was ordered to deliver the car to the vendor upon condition that the latter surrender unpaid notes given for the purchase price, and the vendor thereafter took the car without surrendering the notes, such taking must be deemed to have been in pursuance of the order and the vendor cannot thereafter appeal therefrom.
3. A suggestion by the receiver that the vendor remove the car before the track laid by the purchaser should be taken up gave the vendor no rights contrary to the order and did not prevent the removal from being an acquiescence in the order.

APPEAL from an order of the circuit court for Dane county: MARTIN L. LUECK, Judge. *Dismissed.*

Petition by the *Central Locomotive & Car Works* to recover possession of a combination passenger and baggage car sold to the *Chicago & Lake Superior Railway Company,* an insolvent corporation. At the time the petition was filed the car was in the possession of *Frank W. Lucas,* the receiver of the corporation. Evidence was taken, and on October 10, 1917, the court made an order directing the receiver to deliver the car to the petitioner upon condition that it surrender to the receiver the balance of the unpaid notes which it held for the purchase price of the car. This order was understood by the receiver to be satisfactory to the petitioner, though its attorney stated at the time it was announced by the court that he could not stipulate that such an order should be made. On October 27, 1917, the receiver wrote

to the petitioner stating that if it had not already removed the car it might be advisable for it to do so at once as the purchaser of the steel of the insolvent corporation had made arrangements to take up its track, and if not removed before the track was taken up it might occasion petitioner considerable expense to remove the car. On November 9, 1917, the petitioner appealed from the order made, and on the next day it removed the car to Chicago Heights, Illinois, and still retains the same. The receiver and the defendant *Chicago & Lake Superior Railway Company* seasonably moved to dismiss the appeal on the ground that petitioner, by taking the car, acquiesced in the terms of the order and could not maintain an appeal therefrom. The motion to dismiss the appeal was argued with the merits of the case.

Rufus B. Smith of Madison, for the appellant.

Frank W. Lucas of Madison, the respondent receiver, *pro se.*

For the respondents *Chicago & Lake Superior Railway Company, Robe Dow,* and *B. L. Delameter* there was a brief by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

VINJE, J. The petitioner urges that since the receiver wrote and suggested that it remove the car it had a right to do so without acquiescing in the order made, and that its taking the car could not affect its right to appeal from the order made. The letter of the receiver was no doubt prompted, as stated by him, by the fact that he thought the order made was acceptable to the petitioner, and that to save it expense he wrote advising it of the pending removal of the track. But if not so, the petitioner knew that the receiver had no right to modify or violate the order of the court, and that it could acquire no right from the receiver contrary to the court's order.

Claim is also made that the car was taken by the petitioner to protect it from injury and to save expense. But there is

nothing to show that the receiver would not have adequately cared for it, and certainly no good reason is presented why it should, without leave of the court, have been taken outside of its jurisdiction for protection only. The petitioner must have taken the car either under or in spite of the order. We cannot assume that it intentionally violated the court's order, hence it must be deemed to have taken the car in pursuance thereof. Having so taken it, no appeal by petitioner lies from the order even though it did not, as it says, intend to relinquish its right of appeal. For a party who intentionally accepts the fruits of an order cannot maintain an appeal therefrom.

By the Court.—Appeal dismissed.

FOSTER-LATIMER LUMBER COMPANY, Respondent, vs. INDUSTRIAL COMMISSION OF WISCONSIN, imp., Appellant.

April 3—April 30, 1918.

Workmen's compensation: Amendment of findings and award: New award: Action to review: Pleading: Injury while going from employment: "In the ordinary and usual way:" Catching ride on train.

1. Where findings and an award made and entered by the industrial commission on April 30th were amended within ten days as authorized by sec. 2394—17, Stats., the amendment being a mere correction of the computation, based on facts previously found, and there being no recital of the hearing or of any new findings or award and no vacation or change of any substantial part of the order of April 30th, the complaint in an action to review the award properly described the findings and award as having been entered on April 30th.
2. A finding by the industrial commission that an employee, who was injured when he attempted to catch a ride towards his home upon a freight train which was leaving the platform at the planing mill in which he worked, was "going from his employment in the ordinary and usual way," is *held* not to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Workmen's compensation. Pat Duane had been employed by the *Foster-Latimer Lumber Company* as a planing-mill fireman for many years. The planing mill was situated about one-half mile east of Mellen, Duane living about a quarter of a mile west of Mellen. A switch track of the Soo Railway runs from Mellen to the north side of the planing mill, at which place there is a loading platform. On leaving his work Duane ordinarily walked the length of the platform westerly, descended the steps at the end of the platform, and then on over the track to streets and highways leading to his home. On the day of the accident, after finishing his work, he came onto the platform as usual, but is unable to say just what occurred thereafter, except that he went around two lumber trucks and the next thing he knew he was on the railroad track, injured. Application was made to the *Industrial Commission* for compensation, and upon the hearing the *Commission* found as follows, omitting the formal matters:

"That while engaged in performing services growing out of and incidental to his employment the applicant accidentally sustained personal injury; that at the time of the accident the applicant was going from his employment in the ordinary and usual way while on the premises of his employer; that the injuries sustained by the applicant were proximately caused by the accident,"

and compensation was awarded accordingly. Plaintiff appealed from the decision of the *Commission* to the circuit court for Dane county, and the circuit court set aside the award of the *Commission.* From the judgment of the circuit court the *Commission* appeals.

For the appellant there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent there was a brief by *Brown, Pradt & Genrich* of Wausau, and oral argument by *L. A. Pradt.*

ROSENBERRY, J. Two points are raised on the appeal: (1) That the circuit court had no jurisdiction to review the award of the *Commission,* and (2) that the evidence supports the finding that at the time of the accident Duane was performing service growing out of and incidental to his employment.

1. The findings and award were made and entered on April 30, 1917, and on May 7, 1917, the *Commission,* having its attention directed to the fact that the award should have been for five per cent. less on account of the age of the applicant, amended the findings and award accordingly. An action was begun to review the award of April 30, 1917. It is claimed that when the *Commission* modifies or changes its findings or award, the original order, findings, or award no longer have any force or vitality; that nothing of the original findings and award remain to be reviewed

The power of the *Commission* to amend its findings and award is conferred by sec. 2394—17, Stats., the material part of which reads as follows:

"The commission may on its own motion, modify or change its order, findings or award at any time within ten days from the date thereof if it shall discover any mistake therein."

The amendment contained no recital of the hearing, appearance of counsel, did not recite any new findings or award, but purported to be an amendment to the original award. We think the proceeding in this case was no more than an amendment, and that under the circumstances disclosed here the findings and award were made and entered on April 30, 1917, and that they were properly described in the complaint as having been entered on April 30, 1917, and that the matter was properly before the trial court. There

was no vacation of the order of April 30th; no change of any substantial part of the order, but a mere correction of the computation, based on facts previously found.

2. It appears from the memorandum filed by the *Commission* that "A freight train was just leaving the platform, and the applicant attempted to get aboard one of these cars and ride down to the station or warehouse near his home. In doing so he fell under the cars and sustained injuries necessitating the amputation of his left arm at the shoulder. The accident occurred on the premises of the employer." And in the formal findings, "that at the time of the accident the applicant was going from his employment in the ordinary and usual way, while on the premises of his employer." The trial court said:

"The evidence warrants the finding that it was a common thing for employees to catch a ride on this train when it was on the switch track that served the mill, at the time the men quit work. But, as applicant and other witnesses testified it was 'very seldom' that switching was done at the time the men were quitting work. The applicant in fourteen years' service at the mill could fix only two times when he had ridden on this train. The applicant further testified that the 'usual way' to go home was to walk along the platform that runs beside the switch track where he was injured and then 'over the railway track, right of way, highway, and streets home.' "

The question presented is, Does this evidence sustain the finding that the applicant was coming from his employment "in the ordinary and usual way" within the meaning of sub. (2) of sec. 2394—3, Stats.? This provision of the statutes was added by the legislature of 1913. The legislature did not leave it to the courts to say whether or not an employee going to or leaving the place of his employment, under a given state of facts, was performing service growing out of and incidental to his employment, but limited the liability to cases where the employee was going to or from his employ-

ment in the *ordinary* and *usual* way. Some effect must be given to the words "in the ordinary and usual way." If any effect is given to these words, they must be held not to include an employee who is going to and from his employment in any other than the *ordinary* and *usual* way. We think it clear in this case that catching a ride upon cars being switched in and out of the planing-mill yard was not a usual and ordinary way for employees of the planing mill to go to and from the place of their employment, and that there is no evidence to sustain a finding to that effect. It appears without dispute that the applicant had left the premises in that way only two times in fourteen years; that it was very seldom that switching was being done at the time the men were leaving; and while it does appear that other employees occasionally rode upon cars being switched, there is nothing to show that it was the usual and ordinary way for employees to leave the premises. If it had been the intent of the legislature to make the employer liable for all injuries sustained by the employee after he had completed his services and while he was leaving and still upon the premises of the employer, they would not have limited the employer's liability to injuries sustained while going to and from his employment in the ordinary and usual way. Under familiar rules of construction, we cannot ignore these words or decline to give effect to the legislative intent clearly indicated by their use.

By the Court.—Judgment affirmed.

OWEN, J., took no part.

DE FYN and others, Appellants, vs. POWER and wife, Respondents.

April 3—April 30, 1918.

Service of summons by publication: Defective order: Action to set aside conveyance procured by fraud: Dismissal: Notice of lis pendens.

1. An order for service by publication directing that "plaintiffs or their attorneys deposit a copy of the summons and complaint in the above entitled action, be sent to the last known address of the defendants, if the same can be ascertained, and if not, a mailing of a copy of the summons and complaint to be omitted," was fatally defective under sec. 2640, Stats., there being a substantial failure to comply with statutory requirements jurisdictional in their nature.
2. Where the proceedings in an action to set aside a conveyance of land alleged to have been procured by fraud were regular up to and including the filing of notice of *lis pendens*, defects in an order for service by publication, while they may require the setting aside of such service, do not require the dismissal of the action, since a new and valid order of publication may be procured.

APPEAL from an order of the circuit court for Juneau county: W. B. QUINLAN, Judge. *Affirmed in part; reversed in part.*

This action was brought to cancel and set aside a certain deed conveying real estate in Juneau county, alleged to have been procured by fraudulent means. Defendants were nonresidents and service by publication was attempted. In the order for publication of the summons it was ordered "that plaintiffs or their attorneys deposit a copy of the summons and complaint in the above entitled action, be sent to the last known address of the defendants, if the same can be ascertained, and if not, a mailing of a copy of the summons and complaint to be omitted." This order was dated December 6, 1915. The summons was published in the Mauston Star, as provided by the order, the last publication being

on the 20th day of January, 1916. The defendants did not appear. Proof of the allegations of the complaint was made in the circuit court on the 24th day of April, 1916, resulting in a judgment bearing date May 31, 1916, in favor of the plaintiffs, vacating and setting aside the conveyance complained of. On November 24, 1916, defendants' attorneys appeared specially in the action and served notice of motion for an order "setting aside and vacating the service of the summons herein and that this action be dismissed," on the grounds that the affidavit for and order of publication were defective. As a result of this motion an order was entered on January 13, 1917, "that the service of the summons and complaint in the above entitled action be and the same is hereby set aside; that the action be dismissed, and that the defendants recover ten dollars costs of this motion." From this order plaintiffs appealed.

For the appellants there was a brief by *F. A. Wheelihan* of Neenah and *Clinton G. Price* of Mauston, and oral argument by *Mr. Price.*

Frank H. Hanson of Mauston, for the respondents.

OWEN, J. The order of publication was fatally defective. Sec. 2640, Stats., provides that the order shall (1) direct that service of the summons be made by publication, etc.; (2) that on or before the day of the first publication the plaintiff deposit in a specified postoffice a copy of the summons and complaint addressed to the defendant at his postoffice, to be therein named; or, (3) a direction that such deposit may be omitted because the defendant's postoffice address cannot be ascertained. It will be seen that with reference to the mailing of the summons and complaint the order must contain one of two directions. If the postoffice of the defendant is known, then the order must direct that the summons and complaint be deposited in a specified postoffice, addressed to the defendant at his postoffice address.

If his address cannot be ascertained, then the order must, in express terms, direct that such deposit may be omitted because the defendant's postoffice address cannot be ascertained.

The order in this action directed that "plaintiffs or their attorneys deposit a copy of the summons and complaint in the above entitled action, be sent to the last known address of the defendants, if the same can be ascertained, and if not, a mailing of a copy of the summons and complaint to be omitted." Clearly this is a glaring and substantial failure to comply with statutory requirements jurisdictional in their nature. *O'Malley v. Fricke,* 104 Wis. 280, 80 N. W. 436.

While the service of the summons and complaint was properly set aside, no reason is perceived why the action should be dismissed. The action was brought to set aside a fraudulent conveyance of real estate. The summons and complaint were delivered to the sheriff, who returned that the defendants could not be found within the state of Wisconsin. The summons and complaint were then filed with the clerk of the court and a notice of *lis pendens* was filed in the office of the register of deeds. Up to this point there were no irregularities in the proceedings. No reason is perceived why the plaintiffs cannot, upon the summons and complaint already filed, procure a valid order of publication and complete service upon the defendants. If the notice of *lis pendens* has served to frustrate the defendants' alleged scheme to defraud plaintiffs of their lands, it should not be made inefficacious by a dismissal of the action. While writs of attachment were set aside under similar circumstances in *Cummings v. Tabor,* 61 Wis. 185, 21 N. W. 72, and *Anderson v. Coburn,* 27 Wis. 558, the considerations justifying that course do not require the dismissal of the action here. The execution of a writ of attachment constitutes an interference with property rights. If the writ is void the interference is unlawful. To continue its validity, service in the principal action must be made within a reasonable time. Obviously,

an action brought to preserve plaintiff's property rights from loss through fraudulent machinations is entitled to more considerate treatment. The order should be affirmed so far as it sets aside the service of the summons and complaint and reversed in so far as it dismisses the action.

By the Court.—That portion of the order setting aside the service of the summons and complaint is affirmed, and that part of the order dismissing the action is reversed. Appellants to recover costs in this court.

WELLS and others, Respondents, vs. WISCONSIN RIVER POWER COMPANY, Appellant.

April 3—April 30, 1918.

Mills and milldams: Eminent domain: Compensation for lands made unfit for agriculture: Statutes construed: "Injure."

1. **Under ch. 189, Laws 1907, granting power to build and maintain a dam across the Wisconsin river at Prairie du Sac, the licensees must make compensation for the injury to lands which are made permanently unfit for agricultural purposes by the backing up of the water, as well as for lands which are actually overflowed.**
2. **The word "injure" in sec. 2, ch. 189, Laws 1907, and in sec. 1777*e*, Stats. 1898, should not be construed in its technical legal sense, as referring merely to an actionable wrong, but rather in the popular and usual sense, as applying to any damage inflicted.**

APPEAL from an order of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This is a condemnation proceeding brought by owners of land bordering on the Wisconsin river who claim that their lands are flowed or permanently injured by reason of the erection and maintenance of a dam at Prairie du Sac by the appellant, the *Wisconsin River Power Company.* The appellant admitted the flowing of certain of the lands, but denied that it had flowed the remainder. Upon the hearing

of the petition the court found that certain of the lands were permanently flooded (and no contention is now made against that finding), also that the remaining parcel of the lands was "permanently injured and its use for agricultural purposes practically destroyed by reason of the stoppage and interference with the underground drainage" thereof by the erection and maintenance of the dam, and commissioners were appointed to assess compensation not only for the lands actually flowed but for the damage to the lands not actually flowed but permanently injured for agricultural purposes. The *Power Company* appeals from the order because it includes among the lands to be appraised the last named lands.

For the appellant there was a brief by *Jones & Schubring,* and oral argument by *E. J. B. Schubring* and *Arnold Peterson,* all of Madison.

For the respondents there was a brief by *Grotophorst, Thomas, Rieser & Quale* of Baraboo, and oral argument by *H. H. Thomas.*

WINSLOW, C. J. The question in the case is whether the *Power Company* must make compensation for the injury to lands which are made permanently unfit for agricultural purposes by the backing up of water by its dam as well as for lands which are actually overflowed.

This depends on the legislation under which the *Power Company* is acting, and an examination of that legislation clearly shows, we think, that the question must be affirmatively answered.

The *Power Company* obtains its authority to maintain the dam by virtue of a grant of power made to certain persons (of whom the company is the assignee) by ch. 189, Laws 1907. This act evidently contemplates that the licensees shall make compensation for injuries to lands not flowed as well as for lands actually flowed.

By sec. 2 of the act it is declared that "In case it shall be necessary to take, flow *or injure*" any lands or property for

the purpose of the construction or use of the dam the licensees shall be subject to the provisions and entitled to all the benefits and remedies of ch. 146, Stats. 1898 (the milldam act). By sec. 3 of the act it is further provided that "for acquiring the necessary lands or rights, easements or privileges in lands" necessary for the complete and successful construction of the dam and improvement of navigation, the said licensees may enjoy the rights granted to corporations by secs. 1777 to 1777*e* inclusive, Stats. 1898, and the amendments thereto.

Turning to the statutes last named we find that they have to do with log-driving corporations, which are authorized to improve streams with flooding dams, booms, etc., and are given powers of condemnation for that purpose. The most significant of the sections referred to is sec. 1777*e*, in which it is provided that such corporations may acquire title to necessary lands or easements by purchase or lease or by eminent domain, "and in case it shall be necessary to take, flow *or injure* lands and property in the construction of the works . . . such lands and property or easements therein may be acquired" in the manner prescribed by the statutes with reference to condemnation by railroads.

In our judgment the word "injure" in this statute as well as in the statute licensing the construction of the dam was intentionally inserted and was not intended to be construed in its technical legal sense, *i. e.* an actionable wrong, but rather in the popular and usual sense, namely, an act resulting in damage. If the word were to be construed in its strict technical sense the insertion of it in the statute would accomplish little, if anything; construed in the usual sense, however, it becomes a reasonable and just provision requiring the licensees to make compensation for all damage inflicted by their enterprise.

If authority be necessary to support this reasoning it may be found in *U. S. v. Alexander,* 148 U. S. 186, 13 Sup. Ct. 529, and the cases therein collated.

The case of *Huber v. Merkel,* 117 Wis. 355, 94 N. W. 354, which touches upon the right of a property owner to sink wells on his own land and allow the water to run away, although the flow of water in an adjoining owner's well is thereby diminished, has no application here. In authorizing the erection of this dam the state could impose such terms as it chose, and the licensees must conform to them. They have no other rights save those which the legislature gives them.

By the Court.—Order affirmed.

ROSENBERRY, J., took no part.

PEDERSON and others, Appellants, vs. CHIPMAN and others, Town Supervisors, Respondents (IN RE DRAINAGE SYSTEM, ETC.).

April 3—April 30, 1918.

Town drains: Notice of hearing: Personal service, upon whom required: Award of damages: Compelling performance of required acts: Subsequent flowage and award.

1. The notice provided for in sec. 1360, Stats. 1913, need be served personally only upon the owners of the lands through which the proposed drain will pass, the posting of such notice as prescribed in said section being legal notice to others of the proceeding to lay out the drain.
2. One whose land will be injured by a proposed town drain must proceed diligently to have his damages determined and included in the expense of construction which is to be assessed against the lands benefited.
3. Under sec. 1367*h*, Stats., providing that the circuit court shall require performance when any officer or body fails or refuses to perform an act required "within the time specified in sections 1359 to 1367*c*," the "time specified" must lie somewhere between the filing of the petition and the assessments for construction.
4. Where a town drain was laid out in 1913 and constructed in 1914 after an award of damages duly made, the owners of lands be-

yond and below the end of the ditch, upon which water from the ditch flowed in 1916, cannot by a proceeding commenced in 1917 under sec. 1367*h*, Stats., compel the supervisors to award damages for such flowage, although to one of such owners no damages had ever been awarded and the others claim that the damages which were awarded to them were inadequate.

5. If aggrieved by the award of damages made prior to the construction of the drain, such landowners should have appealed to the county court as provided in sec. 1367, Stats.

APPEAL from an order of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is by *John G. Pederson, Jacob Rostad,* and *Knute Hoverson,* resident freeholders of the town of Leeds, Columbia county.

This is a proceeding under the statutes to compel the supervisors of the town of Leeds, on notice, to meet and award damages to the aforementioned freeholders for alleged damage caused to their lands by a town drain installed in 1914. This drain of the town of Leeds was ordered by the town board in 1913 and constructed in 1914. No notice was served upon the complaining freeholders, as their lands lay beyond and lower than the end of the ditch. In 1916 the water from the ditch flowed in a natural course onto their lands, first onto the lands of *Pederson,* then onto the lands of *Rostad,* and then onto the lands of *Hoverson.*

The three property owners made application to the supervisors requesting them to meet and award them damages for such flowage. It was then discovered that the supervisors had, at the time of the installation of the ditch, awarded damages to *Pederson* in the sum of $100, and to the owner of the lands now owned by *Rostad* the sum of $100. No damages had been awarded to *Hoverson.* The sums had not been paid and the time for an appeal had expired. Appellants claim that these sums are inadequate for the damage resulting from the alleged overflow from the ditch. The supervisors refused to meet, so appellants applied to the cir-

cuit court for an order under sec. 1367*h*, Stats., compelling them to meet and determine the damages. The circuit court dismissed their petition, from which decision appeal is taken.

For the appellants the cause was submitted on the brief of *Nelson & Bushnell* of Madison.

H. E. Andrews of Portage, for the respondents.

SIEBECKER, J. The petitioners contend that they were entitled to personal service of the notice prescribed by sec. 1360, Stats. 1913. The supervisors are required by this section to "make out a notice and fix therein a time and place at which they will meet to examine and decide" upon application for laying out the proposed drain, and "such notice shall specify . . . the several tracts of land through which the same will pass; and the petitioners shall cause the notice to be served upon each of the resident owners of said several tracts of land, personally or by copy left at his usual place of abode, . . . and copies thereof shall be posted up in three public places in the town in which the drainage is situated at least ten days before such time of hearing."

It appears that the drain does not pass through the lands of petitioners and that their lands are not within the limits of the district forming the drain. Manifestly the terms of the statute require personal service of the specified notice only on owners of land "through which" the drain passes. The notice served and posted as shown in the proceeding complied with the statute and conferred jurisdiction on the supervisors to lay out the drain as they did. The petitioners make this application under the provisions of sec. 1367*h*, Stats., providing that if any officer or body fails or refuses to perform an act required "within the time specified in sections 1359 to 1367*c*," Stats., the circuit court shall, unless good cause to the contrary be shown, require performance of the act by the delinquent officer or body. The trial court properly held that in proceedings of this nature "any one having

objection on account of damages to his own lands must have those damages determined before the expense of construction can be assessed against the tracts of lands benefited." *Fraser v. Mulany,* 129 Wis. 377, 109 N. W. 139. Since petitioners had legal notice of the proceeding to lay out the drain, it was incumbent upon them to proceed diligently to have their damages, if any, determined and included in the expense of construction which was to be assessed against the land benefited. The drain was laid out in December, 1913, and petitioners commenced their proceeding in January, 1917. The court correctly held that sec. 1367*h* applies "when the failure or refusal is to perform the act required within the time specified in secs. 1359 to 1367*c*," and hence it "must lie somewhere between the filing of the petition and the assessments for construction." Obviously the petitioners present no grounds for relief within the provisions of this statute. Under the facts presented by the petitioners, if they were aggrieved by the action of the supervisors in the assessment of damages they should have availed themselves of the remedy provided by sec. 1367 and taken an appeal to the county court. It must be held that the petition states no ground for the relief demanded and that the trial court properly dismissed the proceeding.

By the Court.—The order appealed from is affirmed.

ALLEN, Receiver, Appellant, vs. FULTON, Respondent.

April 4—April 30, 1918.

Foreign corporations: Validity of contracts in this state: Stock subscription: Election to affirm: Stockholders' liability to creditors.

1. **Where a resident of this state, through transactions carried on wholly within the state, subscribed and paid for and received stock in a Minnesota corporation which had not complied with the requirements of sec. 1770*b*, Stats., so as to entitle it to transact business in this state, such contract was one affecting the personal liability of the corporation and is governed by sub. 10, and not by sub. 2, of said sec. 1770*b*.**
2. **Where, after such contract of subscription was fully executed, the subscriber owned and retained the stock for a number of years, he must be deemed to have elected to affirm the contract and, as a lawful stockholder, he may, in an action by a receiver of the corporation on behalf of its creditors, be held upon the stockholders' liability created by the law of Minnesota.**

APPEAL from an order of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

Action to enforce a stockholder's liability. On or about October 10, 1910, the defendant, a resident of this state, through transactions carried on entirely within this state, subscribed and paid for five shares of stock of the par value of $100 each in the O. W. Kerr Company, a Minnesota corporation that had not complied with the provisions of sec. 1770*b*, Stats. 1898, and of which company the plaintiff was appointed a receiver on the 13th day of March, 1915, because it was then hopelessly insolvent. Defendant received his certificate of stock at about the time he subscribed and paid for the stock and has owned and retained the same ever since. Under the provisions of sec. 3 of art. 10 of the constitution of Minnesota every stockholder of the corporation becomes liable to creditors in an amount equal to the amount of stock owned or held by him. By due proceedings in the Minnesota court an assessment equal to the amount of stock held by

each stockholder was levied upon and ordered collected from every stockholder whether resident or nonresident. The receiver brought this action to collect such assessment from the defendant, who set up the defense, among others, that the O. W. Kerr Company had not complied with the provisions of sec. 1770*b*, Stats. 1898, and acts amendatory thereof, and therefore his transactions with the corporation were wholly void. Plaintiff demurred to this defense, and from an order overruling the demurrer he appealed.

For the appellant there were briefs by *Kelm & O'Keefe* of Portage, attorneys, and *Morphy, Bradford & Cummins* of St. Paul, Minnesota, of counsel, and oral argument by *E. H. Morphy* and *W. O. Kelm.*

For the respondent there was a brief by *David Bogue* of Portage and *Royal F. Clark* and *A. W. Lueck* of Beaver Dam, attorneys, and *W. S. Stroud* of Portage, of counsel; and the cause was argued orally by *Mr. Stroud* and *Mr. Clark.*

VINJE, J. This appeal raises the question whether a resident of this state, who through transactions carried on wholly within it buys, pays for, and receives stock in a foreign corporation that has not complied with the provisions of sec. 1770*b*, Stats., can, after he has owned and retained such stock for a number of years, be held upon the stock liability created by the state of domicile of the foreign corporation. The answer to the question depends upon whether his transactions with the corporation are rendered void by the provisions of sub. 10, sec. 1770*b*; for it was held in *Southwestern S. Co. v. Stephens,* 139 Wis. 616, 120 N. W. 408, that the purchase of stock in a foreign corporation was a transaction affecting the personal liability of the corporation and therefore came within the provisions of sub. 10 of said section, and was not governed by sub. 2. It may be noted in passing that all transactions with a foreign corporation that has failed to comply with the provisions of sec. 1770*b* come within the

scope of sub. 2 thereof and are made unlawful unless they also come under and are governed by the provisions of sub. 10. Sub. 10 takes all transactions affecting the personal liability of the corporation out of the general condemnation of sub. 2 and provides that they may be enforced against but not by the corporation. They are therefore not void but voidable at the election of the party dealing with the corporation, as was held in the case of *Lanz-Owen & Co. v. Garage E. M. Co.* 151 Wis. 555, 139 N. W. 393. Such party may affirm or disaffirm the contract at his election. In the case of *Southwestern S. Co. v. Stephens,* 139 Wis. 616, 120 N. W. 408, the corporation brought an action to collect the balance due on a stock subscription. That was an action brought by the corporation itself to enforce an executory contract which could not be deemed to have been ratified, and the court held the contract came within the provisions of sub. 10 and hence it could not be enforced by the corporation. In this case the contract of stock subscription was fully executed at the time it was made and has been acquiesced in by the defendant from the time he bought the stock in 1910 till this action was brought in 1917. Defendant must therefore be deemed to have elected to affirm the contract of stock subscription. Having so elected, his liability as a stockholder attached and he can claim no immunity therefrom on the ground that the corporation had not complied with the provisions of sec. 1770*b* at the time he bought his stock. He could have disaffirmed his stock subscription contract if seasonably done and have avoided liability as a stockholder. But he did not do so. He chose to affirm the contract, and the liabilities growing out of such affirmance may be enforced against him by the receiver in behalf of the creditors. This is not an action by the corporation to enforce the contract of stock subscription, but an action by the receiver in behalf of creditors to enforce the liability of the defendant growing out of his having elected to make a valid stock subscription contract.

When by an affirmance of the contract he elected to validate it, he became a lawful stockholder and his liabilities as such at once attached. It follows that the order overruling the demurrer to the defense pleaded was erroneous.

By the Court.—Order reversed, and cause remanded with directions to sustain the demurrer, and for further proceedings according to law.

W. E. SMITH LUMBER COMPANY, Respondent, vs. ESTATE OF FITZHUGH, Appellant.

April 4—April 30, 1918.

Executors and administrators: Claims against decedent: Estate of joint debtor liable for whole: Partnership: Parties: Sales: Advances by purchaser: Interest.

1. **Where one of two partners jointly indebted upon a firm contract dies, the creditor may, under sec. 3848, Stats., establish his claim against the estate of the decedent as if the liability were several and without making the surviving partner a party to the proceeding.**
2. **A finding by the trial court in this case that it was agreed between the parties to a contract for the sale of lumber that advances made by the purchaser to the vendor in excess of a certain sum per thousand feet should bear interest at six per cent. per annum until repaid, is *held* to be sustained by the evidence.**

APPEAL from a judgment of the circuit court for Eau Claire county: A. H. REID, Judge. *Affirmed.*

Action to establish claim against the estate of one joint debtor. The facts will be stated only so far as is necessary to present the questions raised on this appeal. It appears that on or about April 16, 1902, C. W. Hunter & Company, a copartnership consisting of C. W. Hunter and E. W. Tschudy, entered into a contract in writing with *W. E. Smith Lumber Company,* a Wisconsin corporation, by the terms of

which Hunter & Company agreed to sell to the *Smith Lumber Company* all of the merchantable lumber which Hunter & Company might manufacture from certain timber which they had just purchased under an executory contract from the Rust Land & Lumber Company in Mississippi. Hunter & Company were to build a mill and proceed with the manufacture. They needed money to carry on the operation. By the contract the *Smith Lumber Company* agreed to make certain advances in order to make the first payment on the timber and to enable Hunter & Company to build a mill and put it in operation, and certain advances thereafter on monthly estimates of lumber put on sticks. The mill was built in the year 1902, sawing was begun in December, 1902, and finished in August, 1909, during which time and immediately thereafter sixty million feet of lumber was manufactured and delivered to the *Smith Company*. The deceased, Daniel Fitzhugh, was not originally a member of the partnership of Hunter & Company, but became a member thereof by purchasing the interest of C. W. Hunter therein and by then and there legally assuming liability for the indebtedness of the said partnership and for the further performance of the contract; so that he may be treated as a partner from the beginning. Daniel Fitzhugh died in March, 1909, being then a resident of Eau Claire county, and the latter part of the contract on behalf of said Hunter & Company was carried out by the surviving partner, Tschudy. No settlement of the affairs of the partnership of Hunter & Company has ever been made, and said partnership has no assets excepting about 3,100 acres of land located chiefly in the state of Mississippi, the title to which is held by the plaintiff, *Smith Lumber Company,* as security taken in accordance with the terms of the aforesaid contract.

A claim was filed in county court against the estate of Fitzhugh for the amount due the plaintiff. It was contended, in the answer to the petition setting up the claim,

that if any liability existed on the part of the estate of Daniel Fitzhugh to the plaintiff it was a joint liability; that Tschudy is the sole surviving partner of C. W. Hunter & Company, residing at Memphis, Tennessee, and should be made a party, and that the claim of the plaintiff should be satisfied out of the partnership assets, and set out the fact that the partnership is still the owner of a large amount of land. There was a trial before the county court and judgment in favor of the plaintiff, from which the defendant appealed to the circuit court. In the circuit court the entire matter was retried, and the account between C. W. Hunter & Company and the plaintiff restated. Judgment was directed against the estate of Daniel Fitzhugh for the sum of $60,201.87, with simple interest at six per cent. per annum on the principal sum of $42,879.45 from April 17, 1916, to the date of judgment, but with a stay as hereinafter stated. Judgment was entered accordingly, absolute in form, but subsequently an order was entered staying the enforcement of the judgment "until further application shall be made to the court therefor, and report made of the steps taken and the progress made in the state of Mississippi to first exhaust the assets of C. W. Hunter & Company before resorting to the assets of Daniel Fitzhugh in the state of Wisconsin." From the judgment so entered the defendant appeals.

For the appellant there was a brief by *Sturdevant & Farr* of Eau Claire, and oral argument by *L. M. Sturdevant.*

For the respondent there was a brief by *Bundy & Wilcox* of Eau Claire and *W. H. Fitzhugh* and *Wilson & Armstrong* of Memphis, Tennessee, and oral argument by *Julian C. Wilson* and *Roy P. Wilcox.*

ROSENBERRY, J. The errors relied upon are three: (1) The court erred in rendering judgment against the defendant until plaintiff had exhausted its remedy against the surviving partner of the firm of C. W. Hunter & Company.

(2) The court erred in refusing to require the surviving partner of C. W. Hunter & Company to be made a party to this action. (3) The court erred in its construction of the contract as to the payment of interest by C. W. Hunter & Company.

The first and second assignments of error are discussed together, and involve a construction of sec. 3848, Stats., which is as follows:

"When two or more persons shall be indebted on any joint contract or upon a judgment founded on a joint contract and either of them shall die his estate shall be liable therefor, and the claim may be allowed by the court as if the contract had been joint and several or as if the judgment had been against him alone, and the other parties to such joint contract may be compelled to contribute or to pay the same if they would have been liable to do so upon payment thereof by the deceased."

It appears without dispute that the debt owing from C. W. Hunter & Company to the plaintiff was the joint debt of Tschudy and Fitzhugh, copartners. It is claimed by the appellant that the estate of Daniel Fitzhugh is not liable at law to the plaintiff, and that if any action at all can be maintained against the estate it must be maintained upon equitable grounds. *Sherman v. Kreul,* 42 Wis. 33. That a partnership creditor can enforce payment against the estate of a deceased partner only when it is made to appear that the surviving partner is insolvent. *Voorhis v. Childs' Ex'r,* 17 N. Y. 354; *Pope v. Cole,* 55 N. Y. 124; *Costigan v. Lunt,* 104 Mass. 217. It is further contended that plaintiff must first exhaust the securities held by it before it can resort to a claim against the estate of the deceased partner. *Wilder v. Keeler,* 3 Paige Ch. 167, 23 Am. Dec. 781; *Ladd v. Griswold,* 4 Gilm. (Ill.) 25, 46 Am. Dec. 443; *Lawrence v. Trustees,* 2 Denio, 577; *Bradley v. Burwell,* 3 Denio, 261.

Whatever the rule may have been at common law is immaterial, if under the provisions of sec. 3848, Stats., the plaintiff has a right to establish his claim as against the es-

tate of the deceased copartner. If the statute does not mean that a claim may be established against the estate of a deceased joint debtor as if the liability were several, and that in the event the estate is compelled to pay the same it may have contribution therefor, it is difficult to give it any meaning at all. The claim of the plaintiff in this case is clearly not contingent. *Austin v. Saveland's Estate,* 77 Wis. 108, 45 N. W. 955.

In the case before us two persons were indebted on a joint contract and one of them died. The statute provides that his estate shall be liable therefor, and that the claim may be allowed as if the contract had been joint and several, which has been done in this case. Exposition cannot make the matter plainer than it is made by a statement of the facts and a consideration of the statute. The claim was correctly allowed against the estate, and it might be proved without making the surviving partner a party to the action.

After providing for the advancement of $5,000 with which to complete the mill, the contract contained the following agreement:

"And the second parties [plaintiff] agree that it will hereafter advance on monthly estimates to be made by itself on the lumber manufactured during the preceding month, as much as five and 50-100 ($5.50) dollars per one thousand feet on the lumber manufactured and put on sticks. On all such advances the first parties shall pay interest at the rate of six per cent. per annum, but on advances made on monthly estimates the interest shall cease to run after the lapse of ninety days from the date of each advance."

Advances were made greatly in excess of the amounts that were due under the contract. The defendant contends that the phrase "as much as five and 50-100 ($5.50) dollars per one thousand feet" implies that if a greater sum is advanced it is advanced under the same terms as the $5.50, and that therefore the advances cease to bear interest after the lapse of ninety days from the date of each advance. We do not

find it necessary to determine whether or not that is a correct construction of the contract. The trial court found:

"And it became agreed and understood between the parties that upon all such excess advances [in excess of $5.50 per thousand feet] Hunter & Company should be charged with interest at the rate of six per cent. per annum until repaid. The advances were thereafter made by *Smith Company* as the pressing necessities of Hunter & Company required, and upon requests of Hunter & Company and without waiting for or particularly having reference to estimates of lumber put on sticks."

There is ample evidence in the record to sustain this finding of the trial court, and it disposes of the question as to whether or not interest upon excess advances was properly allowed, adversely to the claim of the defendant.

By the Court.—Judgment affirmed.

KRAUSE and wife, Appellants, vs. REICHEL, Respondent.

April 5—April 30, 1918.

Contracts: Rescission: Fraud: Sale of non-existent "good will" and "business:" Procuring appointment to agency: Discharge through appointee's fault: Entire contract: Inadequacy of consideration: Married women: Separate property: Mortgage to secure husband's debt.

1. In an action by K. and wife to set aside on the ground of fraud a mortgage given by the wife on her separate property to secure a part of the purchase price which K. had agreed to pay for the equipment used by defendant as a distributing agent for an oil company and for the "good will" of the business when the defendant procured the appointment of K. as his successor in the agency, findings by the trial court negativing fraud on the part of the defendant are *held* to be supported by the evidence, which shows, among other things, that K. knew that the agent was subject to discharge at any time by the company and that there was no "good will" or "business" which would exist after such

discharge; that plaintiffs fully understood the contract with defendant; and that no claim of fraud was made until, a few months after his appointment to the agency, K. was discharged through his own fault.

2. The fact that in procuring the appointment of K. the defendant concealed his interest in the matter from the manager of the oil company, who testified that if he had known of such interest he would not have accepted defendant's recommendation, does not affect plaintiffs' rights, they having obtained the property and the agency contracted for, and the agency having been lost wholly through the fault of the plaintiff K.
3. Since the plaintiffs paid or agreed to pay a gross sum for the equipment and for the procurement of the agency and it cannot be said that any definite part of that sum was for the one thing or the other, the contract is not separable.
4. Even if the equipment and the procurement of the agency, taken together, were an inadequate consideration for the payment to be made by plaintiffs, that fact alone is not a fatal defect or cause for rescission where, as in this case, the inadequacy is not so gross as, of itself, to prove fraud.
5. A married woman may give a valid mortgage on her own property in payment of or as security for her husband's debt.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

Action in equity by husband and wife to set aside, on the ground of fraud, a mortgage of $2,000 upon the wife's separate property, given to secure the payment of $2,000, being a part of the consideration which her husband had agreed to pay to the defendant by the written contract hereinafter set forth.

The principal facts may be briefly stated as follows: The defendant, *Reichel,* was for some years prior to May 25, 1915, the distributing agent of the Standard Oil Company at Shawano, Wisconsin, and vicinity, owning an equipment of horses, wagon, sleigh, etc., used in the business, worth about $1,000. He received a commission on all sales made and was subject to discharge at any time at the pleasure of the company. His gross receipts were about $2,600 to $2,700 a year,

out of which the expenses of keeping the horses had to be taken, the repairs on the outfit being defrayed by the company. *Reichel* and *Krause* had been friends for years, and there had been talk between them about *Reichel* getting *Krause* a job. *Krause* had accompanied *Reichel* on some business trips and had some knowledge of the business. *Reichel* wished to retire from the agency in May, 1915, and suggested to *Krause* and his wife that they buy him out, *i. e.* buy the equipment, and he (*Reichel*) would exert his influence with the Standard Oil Company to get him (*Krause*) appointed agent in his place. *Reichel* proposed that *Krause* pay him $5,000 for the equipment and "the business." Both parties had the idea, apparently, that *Reichel* really had a good will or a business to sell. As matter of fact he had no "good will" in the legal sense, nor did he have a business to sell: he could be discharged at any time if he did not give satisfaction, and *Krause* knew this fact and knew that he himself would be in the same position if he were appointed agent. So while both parties talked about the good will and the business and about the transfer of it from *Reichel* to *Krause,* both parties knew the fact that there was no "good will" or business which would exist for a day after the Standard Oil Company chose to terminate the agency. *Reichel* stated to *Krause* what his receipts were, no inquiry was made as to the amount of the expenses, nor does that amount appear in the evidence. *Reichel* cautioned *Krause* to say nothing about the deal to others, and the parties finally agreed on $3,000 as the price of the property and "the business" as they called it, *i. e.* the procuring of the agency by *Reichel* for *Krause,* and had a written contract drawn embodying the agreement. This contract, after reciting *Reichel's* agency and equipment and the fact that *Krause* desires to purchase the equipment, the good will of the business, and secure the agency, provides that, in consideration of $3,000, to be paid $500 in cash, $500 in a seven-months note secured by chattel

mortgage on the equipment, and $2,000 in notes payable at specified times in the future, secured by mortgage on certain described property (the same being the mortgage in controversy here), *Reichel* sells and conveys to *Krause* the equipment and the good will of the business, and agrees not to go into the business of selling oil in Shawano or vicinity as long as *Krause* remains in the business. The contract further states that no representations or warranties about the business, property, or income have been made except those set out in the contract and that the average *gross* income of the business for the immediately preceding year has been $220 a month. The contract further provides that if *Reichel* should be unable to obtain the agency after exercising due diligence to do so, the contract should be void, but that the contract should not in any manner be contingent upon the ability of *Krause* to keep the agency. This contract was executed by *Reichel* and *Krause, Mrs. Krause* being present at the time. *Reichel* immediately went to Milwaukee to see Mr. Nichols, the manager of the Oil Company, who had charge of the territory in question, and recommended *Mr. Krause* for appointment in his place. Nichols wanted to see *Krause,* and *Reichel* returned to Shawano and went back to Milwaukee with *Krause.* The result of the second interview was that *Krause* was appointed, and the deal between *Reichel* and *Krause* was closed and the mortgage in question executed and delivered. *Reichel* said nothing to Nichols about his arrangement with *Krause,* and Nichols testified that if the company had known of this contract they would not have taken *Reichel's* advice. *Krause* took over the equipment and the business about June 1st. His gross monthly commissions on the average considerably exceeded the amount named in the written contract. Four months after the transfer *Krause* paid *Reichel* $150 to apply on the $500 note. *Krause* was discharged at the end of October because he was short in his accounts. The trial court made findings of fact negativing

all claims of fraud or misrepresentation on the part of *Reichel,* and finding that both *Krause* and his wife knew what they were buying, understood the business, and received all they bargained for. Judgment dismissing the complaint and affirming the validity of the notes and mortgage in question was rendered, and the plaintiffs appeal.

For the appellants there was a brief by *Dillett & Winter* of Shawano, and oral argument by *P. H. Martin* of Green Bay.

For the respondent the cause was submitted on the brief of *D. G. Classon* of Oconto.

WINSLOW, C. J. There was sufficient evidence to support the findings of fact of the trial court negativing fraud on the part of *Reichel.* The statement in the written agreement that there have been "no representations, warranties, or guaranties with reference to said business, property, or otherwise, or the income therefrom, except those herein fully set out," except that the average gross income of the business for the year has been $220 a month, may not perhaps be conclusive on the plaintiffs, but it is certainly of much weight when it is remembered that the plaintiffs were *sui juris,* of average intelligence and brightness, and that the contract was read over to them and explained to them before signature, and that they made no claim of any deception or fraud until they had, through their own fault, lost the business.

It appears by the testimony of the general agent, Mr. Nichols, that he would not have accepted *Reichel's* advice as to the appointment of *Krause* as his successor had he known that *Reichel* had attempted to sell the business by his contract with *Krause,* and the fact that *Reichel* concealed the attempted sale from Nichols is much relied on as a fraud upon *Krause* and his wife. We are not able to see, however, that this fact in any way concerns the plaintiffs or affects their rights. They received just what they bargained for and knew they were bargaining for. They lost the agency, not

by reason of any act of *Reichel's,* but by reason of their own inefficiency or worse in the conduct of the business. There is no proof or intimation that the company would have discharged *Krause* so long as he was rendering faithful and satisfactory service, even had the prior contract with *Reichel* been discovered after he had entered on his work. *Reichel's* lack of candor and frankness with the company does not seem to have in any way affected the situation or the plaintiffs' rights at any time. Practically the only complaints the plaintiffs now have to make in their testimony is that *Reichel* had in fact no business to sell and that he ought to have told them that *Krause* would not be able to transact the business and hold the job. As we have seen, all the parties understood that *Krause* could be discharged at any time if his work was not satisfactory, and, knowing this, they necessarily knew that there was no "business," in the ordinary sense of the word, to sell. As to the second contention just named, the fact seems clear that *Krause* had full information as to the nature of the business and the demands which it made on business capacity.

It may well be that the plaintiffs made a poor bargain, indeed this seems fairly well proven, but they made it with their eyes open and were not defrauded. They paid or agreed to pay a gross sum for the personal property and for the effort of *Reichel* to procure the agency for them. It cannot be said that they paid any definite part of the consideration for this effort or influence and another definite part for the personal property; in other words, the contract is not separable. There was a tangible consideration (*i. e.* the equipment) and an intangible one, namely, the successful exertion of influence to obtain the agency for *Krause.* Taken together they may be inadequate, but mere inadequacy of consideration alone is not a fatal defect or cause for rescission unless the inadequacy be so gross as to prove fraud by its very inadequacy under the circumstances, and we cannot

say that the present is such a case. *Rust v. Fitzhugh,* 132 Wis. 549, 112 N. W. 508.

It was entirely competent for *Mrs. Krause* to give a valid mortgage on her own property in payment of or as security for her husband's debt. *Fitzgerald v. Dunn,* 112 Wis. 37, 87 N. W. 803.

By the Court.—Judgment affirmed.

The following opinion was filed May 20, 1918:

ESCHWEILER, J. (*dissenting*). By the defendant's own testimony he considered the personal property worth about $1,000 and the business worth $2,000. The sale for $3,000 by defendant was to plaintiff *Charles Krause* only, and not to *Lydia Krause.* Two thousand dollars is also just the amount of the mortgage given by the plaintiff *Lydia* on her separate property, and which mortgage she seeks to have canceled in this action. The $2,000 of the $3,000 purchase price, plainly separable under the admissions of the defendant and therefore binding as such against him, whether the parties so specified in the contract or not, was of no value whatsoever unless and except the Standard Oil Company would consent to take plaintiff *Charles Krause* as its agent in place of defendant. *Reichel* recommended *Charles Krause* to the Standard Oil Company as a proper successor, but in doing so concealed from that company the fact that it was to his financial interest to the extent of $2,000 to have the contract given to *Krause.* He was expressly asked for information on that precise point and made a material false statement in answer. There is no escape from the conclusion, under the testimony, that if he had been truthful the agency would not have been given to the plaintiff *Charles Krause,* and the plaintiff *Lydia Krause* would have saved her separate property.

If defendant *Reichel* were suing for this $2,000 as being unpaid on the agreed purchase price and the same facts were disclosed as here, I think the court would have been bound

to have denied him relief, as he, in order to maintain his right to secure his $2,000, would have to show his own wilful deceit in connection with and as a part of the transaction and without which deceit the condition requisite to his right to recover would not have come into existence. *Sauerhering v. Rueping,* 137 Wis. 407, 412, 119 N. W. 184; *Holcomb v. Weaver,* 136 Mass. 265; *Harrington v. Victoria G. D. Co.* L. R. 3 Q. B. D. 549.

I think it follows as a necessary consequence that the plaintiff *Lydia Krause* was entitled to have the $2,000 mortgage executed by her canceled.

PAWLAK, Respondent, vs. PELKEY and another, Appellants.

April 5—April 30, 1918.

Fraud: Procuring conveyance from person mentally incompetent: Evidence: Witnesses: Competency: Value of property: Verdict: Passion or prejudice of jury.

1. **Findings by the jury to the effect that a defendant procured the conveyance to him by plaintiff of real and personal property at a time when plaintiff was, and defendant should have known he was, mentally incapable of contracting, are *held* to be sustained by the evidence; and the findings as to the value of such property are *held* to be well supported and not to indicate passion or prejudice.**
2. **The mental competency of a witness to testify is largely a question for the trial court, and impaired mental condition ordinarily goes to the weight or credibility of the evidence.**
3. **A report, made in September, 1914, by the examining physicians in an inquisition as to the sanity of a person, to the effect that he was sane, bore very remotely, if at all, upon the question of the competency of that person to contract in July, 1915; and the exclusion of such report was not error.**
4. **An offer, by a defendant who procured a conveyance of property from the plaintiff at a time when the latter is alleged to have been mentally incompetent to contract, to show that soon afterwards he asked the town board to take the deed in their name and pay the debts on the property, the offer being made for the purpose of showing good faith on the part of the defendant, was properly refused, such evidence being incompetent.**

APPEAL from a judgment of the circuit court for Oconto county: OSCAR M. FRITZ, Judge. *Affirmed.*

The complaint in this case was amended on the trial and as amended states substantially that the plaintiff was the owner of certain personal property and also certain real estate at the time alleged in the complaint; that in October, 1914, the defendants were the owners of a $700 note secured by a mortgage upon plaintiff's property, and that thereafter defendants sold said note and mortgage and guaranteed the payment of the note; that in July, 1915, while said note and mortgage were unpaid, the defendant *Sol G. Pelkey,* on behalf of the defendants, obtained from the plaintiff a deed of conveyance of real estate without paying any consideration therefor, which real estate was of the value of $2,300, subject to an incumbrance of $700; that defendants had guaranteed payment thereof; that in July, 1915, defendants conveyed said real estate to one John Neta, and that said Neta is an innocent purchaser thereof; that on July 2, 1915, and for some time prior thereto plaintiff was and still is of unsound mind and incapable of doing business; that July 2, 1915, defendants were acting as collectors of certain notes and mortgages upon the property of plaintiff and threatened to foreclose; that defendants demanded from plaintiff a bill of sale of all personal property owned by plaintiff in payment of said notes and mortgages amounting to $200; that said personal property was of the value of $950 and defendants paid no consideration therefor; that by reason of the premises plaintiff was damaged in the sum of $2,350, for which judgment was demanded.

The jury found that on July 2, 1915, the time of the transaction with *Sol G. Pelkey,* plaintiff was mentally incapable of understanding the nature and import of the transactions, including the bill of sale and deed which he then executed; that said *Sol G. Pelkey* knew at the time of the transactions that plaintiff was mentally incapable of understanding the nature

and import thereof, and that said *Sol G. Pelkey* ought, in the exercise of ordinary care, to have known that plaintiff was so mentally incapable; that the market value July 2, 1915, of the personal property removed by said *Pelkey* was $700, and that the market value July 2, 1915, of the property described in the deed executed by plaintiff was $2,000.

Plaintiff moved for judgment on the verdict; defendants made several motions, and among others a motion to set the verdict aside and for new trial. The court overruled all of defendants' motions and granted plaintiff's motion for judgment on the verdict. Judgment was rendered accordingly, from which this appeal was taken.

For the appellants there was a brief by *Classon & Whitcomb* and *John B. Chase* of Oconto, and oral argument by *Allan V. Classon.*

For the respondent there was a brief by *Lehner & Lehner* of Oconto Falls, and oral argument by *Philip Lehner.*

KERWIN, J. The facts are substantially set forth in the statement of the case. Motions were made for nonsuit, to change the answers in the special verdict, and for judgment notwithstanding the verdict, which motions were overruled and error assigned.

1. The foregoing assignments of error all involve the sufficiency of the evidence. Quite a lengthy argument is made by counsel for appellants under this head, but we are convinced that there is sufficient competent evidence to support the verdict, and that the court below committed no error in overruling the above motions.

2. Error is assigned in allowing the plaintiff to testify on the ground that he was mentally incompetent. It is true that the evidence of plaintiff was not very coherent and is subject to criticism. But the trial court was in better position to judge of the competency of the evidence than this court. Moreover, the competency of a witness to testify is largely a

question for the trial court, and impaired mental condition of a witness ordinarily goes to the weight or credibility of the evidence. *Burns v. State,* 145 Wis. 373, 128 N. W. 987; 40 Cyc. 2201, 2573. We are convinced that no error was committed under this head.

3. Error is assigned in refusal of the court below to admit in evidence a report of the examining physicians made on the 14th day of September, 1914, in regard to the mental condition of the plaintiff. This report was made on a petition for an inquisition relative to the insanity of the plaintiff and the report was to the effect that the plaintiff was sane. There was no error in excluding this report. It bore very remotely, if at all, upon the question of the competency of the plaintiff to contract on the 2d day of July, 1915. Moreover, one may be feeble-minded and not of sufficient capacity to contract and not necessarily in such mental condition as to require incarceration.

Point is also made by counsel for appellants that error was committed in refusing to admit certain testimony respecting an offer to show that after the conveyance the defendant *Sol G. Pelkey* went to the town board on the day or the day after he procured the deed from plaintiff and asked the board to take the deed in their name, and the personal property, and pay the debts on said property, and that the offer was made for the purpose of showing good faith on the part of defendant *Pelkey* in dealing with the plaintiff. This evidence clearly was incompetent and the ruling of the court below upon the offer was proper.

4. It is contended that the verdict of the jury in regard to the value of the property shows passion and prejudice, and that the amounts found were greatly in excess of what the record shows those values should be. An examination of the evidence convinces us that there is not only nothing to indicate passion or prejudice on the part of the jury on this question, but on the contrary we think the verdict as to values is well supported by the evidence.

Some other technical points are raised by counsel for appellants which we do not deem of sufficient weight to require treatment.

On the verdict in this case, which we regard supported by the evidence, it is clear that the plaintiff was entitled to judgment.

By the Court.—Judgment affirmed.

NEW YORK CONTINENTAL JEWELL FILTRATION COMPANY, Appellant, vs. CITY OF KENOSHA, Respondent.

April 6—April 30, 1918.

Building contract with city: Construction: Provisions as to payment for labor and materials: "Subcontractor:" Contract for benefit of third persons: Action by contractor: Counterclaim by city: Parties: Bringing in all persons interested: Surety on contractor's bond.

1. The initial proposal for the construction of a filtration plant for a city provided that the contractor must give a bond "to guarantee the faithful performance of the contract and the payment of all labor and materials." That provision was, by reference, made a specific part of the contract, which also provided that the contractor was to be paid a certain percentage of the proportionate value of the work done monthly on the estimate of the city engineer, and the balance due as soon as certain city officials were satisfied that the work was completed and that all claims and demands against the contractor "by any subcontractor for work performed or material furnished" were paid; and that before final payment was made the contractor must satisfy the city officials that "all bills for labor and materials used in the work have been paid." The bond given to secure faithful performance of the contract provided: "The surety shall not be liable under this bond to any one except the owner, but it is agreed that the owner, in estimating his damage, may include the claims of mechanics and materialmen arising out of the performance of the contract." *Held* that, construing together these various provisions, that relating to payment of the claims of subcontractors does not limit and restrain the more comprehensive language in the others, but the term "sub-

contractor" should, rather, be construed in a broad sense, harmonizing with the other language, so as to include all persons having claims for services performed or materials furnished in the construction of the plant, whether done at the request of the principal contractor, a subcontractor, or other person having authority to contract in such behalf.

2. Such stipulations in the contract are not deemed to have been made by the city for its own protection only, but also for the benefit of all persons having unpaid claims for labor or materials which entered into the construction of the plant.
3. In an action against the city by the contractor to recover an unpaid balance of the contract price, the city might properly counterclaim for the amount of such unpaid bills of laborers and materialmen, whether they amount to more or less than said unpaid balance, and the amount thereof, as established, will furnish a basis for an offset or recovery in favor of the city against the plaintiff.
4. Where the city interposed such a counterclaim, the appropriateness of asking, as part of the prayer for relief, that the various claimants and the surety on the bond be made parties to the action, is doubted; but the purpose to implead all such interested persons, so that the rights and liabilities of all can be established by a single judgment, is approved.

APPEAL from an order of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

On the 21st day of February, 1916, the city of *Kenosha* contracted with the plaintiff for the construction of a concrete filtration plant for the sum of $86,800. Extras were afterwards agreed upon and furnished pursuant to the terms of the contract in the sum of $5,927.24. The plant was constructed and accepted by the city. Plaintiff brings this action to recover an unpaid balance of $14,202.79. As a counterclaim and defense the city sets up that it was a part of the agreement that the contractor or plaintiff should pay for all labor and materials entering into the construction of the plant; that a considerable portion of the work was sublet to the Sterling Engineering & Construction Company; that unpaid claims incurred by said subcontractor to the amount of $17,663.31 had been presented to the city; that by reason of

the agreement on the part of the plaintiff to pay for all material and labor entering into the construction of the plant a claim exists in favor of the city and against the plaintiff and the surety on its bond for such unpaid claims. The plaintiff demurred to the counterclaim thus set up. The court overruled the demurrer, and from such order the plaintiff appealed.

For the appellant there was a brief by *Samuel K. Markman* of Chicago and *Fisher & Fisher* of Kenosha, and oral argument by *Mr. Markman.*

For the respondent there was a brief by *John C. Slater,* city attorney, and *Cavanagh, Barnes & Cavanagh* of Kenosha and *Bottum, Bottum, Hudnall & Lecher* of Milwaukee, of counsel, and oral argument by *Mr. Slater* and by *Mr. F. L. McNamara* of Milwaukee.

OWEN, J. The question is whether the counterclaim states a cause of action in favor of the city against the defendant contractor. It is alleged that the initial proposal for the construction of the plant made by the defendant to the city, which was subsequently accepted and formed the basis of the contract between the parties, contained this provision: "The contractor must enter into a bond for fifty per cent. of the contract price to guarantee the faithful performance of the contract *and the payment of all labor and materials.*" This provision was, by appropriate reference, made a specific part of the contract. It is also alleged that the contract provided that the contractor was to be paid "eighty-five per cent. of the proportionate value of the work done monthly as the work progressed, on the estimate of the city engineer of said defendant, and the remaining fifteen per cent., together with any other sums due on the contract, if any, on the full completion of the entire work, as soon as the city engineer and board of water commissioners of said defendant were satisfied that the work was completed, and that all claims and demands

against the plaintiff herein by any *subcontractor* for work performed or material furnished in the erection and construction of said filtration plant were paid." It is further alleged that said contract also provided that before the final payment was made the plaintiff must satisfy the said board of water commissioners that "all bills for labor and materials used in the work have been paid;" that the bond given to secure the faithful performance of the contract contained the following provision: "The surety shall not be liable under this bond to any one except the owner, but it is agreed that the owner, in estimating his damage, may include the claims of mechanics and materialmen *arising out of the performance of the contract.*"

In their brief the attorneys for the appellant contractor assume that that part of the contract providing that the contractor shall be paid "eighty-five per cent. of the proportionate value of the work done monthly as the work progressed, on the estimate of the city engineer of said defendant, and the remaining fifteen per cent., together with any other sums due on the contract, if any, on the full completion of the entire work, as soon as the city engineer and the board of water commissioners of said defendant were satisfied that the work was completed, and that all claims and demands against the plaintiff herein by any *subcontractor* for work performed or material furnished in the erection and construction of said filtration plant were paid," is of controlling significance, and cite cases from other jurisdictions involving the meaning of the term "subcontractor," as used in the various statutes dealing with the subject of mechanics' liens, and easily reach the conclusion that those who furnished material and labor for the subcontractor, Sterling Engineering & Construction Company, are not within the protection of the contract and bond.

The various provisions of the proposal, contract, and bond above quoted must all be construed together, and effect given to the intent of the parties as disclosed by these various ex-

pressions. Before appellant's contentions can be accepted it must appear that the provision providing for the payment of claims of subcontractors limits and restrains the more comprehensive language used in other parts of the various written instruments constituting the agreement and culminating the rights of the parties, such as: "The contractor must enter into a bond for fifty per cent. of the contract price to guarantee the faithful performance of the contract and the payment of all labor and materials,"—found in the proposal; "Before the final payment is to be made, the plaintiff must satisfy the board of water commissioners that all bills for labor and materials used in the work had been paid,"—found in the contract; "The surety shall not be liable under this bond to any one except the owner, but it is agreed that the owner, in estimating his damage, may include the claims of mechanics and materialmen arising out of the performance of the contract,"—found in the bond.

Gathering the intention of the parties, as we must, from each and every expression bearing upon the subject found in the various written instruments relating to and constituting the contract between them, there seems to be no reasonable doubt that every person who in any manner rendered and performed labor and services, or furnished materials of any kind, nature, or description in and about the construction of said filtration plant, was within the protection of the contract and bond, and that the term "subcontractor," as used in the provision of the contract referred to, cannot restrain other expressions often repeated, comprehending a larger class, to the narrow and technical meaning ascribed to the term as used in particular statutes. It is rather our view that the term "subcontractor," as used in the contract, should be construed in the light of other expressions used elsewhere in the contract as well as in the proposal and bond, of similar though broader significance, and in harmony with such expressions. As so construed, it includes all persons who have acquired

claims for services and materials bestowed upon, or furnished for, the construction of the plant, whether done at the request of a principal or a subcontractor, or other person having authority to contract in such behalf.

Attorneys for appellant also contend that stipulations in a contract such as this, requiring the contractor to pay for all labor and material, are deemed to have been made by the city for its own protection and not for the benefit of third persons, and cite authorities from other jurisdictions, all of which are out of harmony with the decisions of this court upon that subject. If it was not settled before, the decision of this court in *Builders L. & S. Co. v. Chicago B. & S. Co., ante,* p. 167, 166 N. W. 320, leaves no doubt concerning its attitude upon this question, and no more need be said upon the subject.

It follows that all furnishing labor or materials, entering into the construction of the plant, for the subcontractor, Sterling Engineering & Construction Company, whose claims are unpaid, not only have a valid claim against the plaintiff under the settled law of this state relating to contracts made by one for the benefit of another (*Builders L. & S. Co. v. Chicago B. & S. Co., supra; Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440; *U. S. G. Co. v. Gleason,* 135 Wis. 539, 544, 116 N. W. 238; *R. Connor Co. v. Ætna Ind. Co.* 136 Wis. 13, 18, 115 N. W. 811; *Warren Webster & Co. v. Beaumont H. Co.* 151 Wis. 1, 10, 138 N. W. 102; *Concrete S. Co. v. Ill. S. Co.* 163 Wis. 41, 44, 157 N. W. 543), but that the city, as a defense to the present action, may counterclaim against the plaintiff for the amount of such unpaid bills, whether they amount to more or less than the amount remaining unpaid of the contract price of the filtration plant.

The liability of the contractor and the surety upon the bond is not limited to the amount that remains unpaid on the contract price. The obligation of both calls for the full payment of all such claims. The provision in the contract that final payment shall not be made until all such claims are paid is

not a limitation upon the extent of their liability, but is simply a provision for the benefit and better protection of the city and the beneficiaries of this provision of the contract—laborers and materialmen. It is true that the bond contains a provision that "the surety shall not be liable to any one under this bond except the owner." Whatever effect is to be ascribed to this provision so far as the surety is concerned, it does not apply to the contractor. It was probably inserted for the purpose of exempting the surety from the embarrassment of numerous actions by individual claimants. But, however that may be, this action is brought by the city, and in this action all unpaid claims for material and labor entering into the construction of the plant, by whomsoever and to whomsoever furnished, may be established, and the amount thereof will furnish a basis for an offset or recovery, as the case may be, in favor of the city against the plaintiff.

As a part of its prayer for relief the city asks that the various claimants of whom it has knowledge, as well as the surety on the bond, be made parties to the action. The appropriateness of this in a prayer for relief may well be doubted. The bringing in of new parties comes in the course of the proceedings and is not a matter to be dealt with in a final judgment. That, however, does not make the counterclaim demurrable, and perhaps mention of the matter is unnecessary. But because it appears that the city attorney has in mind the bringing in of all parties interested, to the end that all conflicting interests may be determined in this action, a proposition much favored by this court, it seems appropriate to suggest that seasonable application for an order in that behalf should be made. If the proper application be made, such an order will no doubt be granted. The amount of the various claims can then be judicially determined under circumstances according to every one interested the right to be heard. All conflicting interests can be considered and determined, and effect will be given to the pro-

vision of the bond intended to exempt the surety, as we conceive its purpose to be, from the annoyance of a multiplicity of actions.

We think not only that the order overruling the demurrer was right, but we approve the obvious purpose of the city attorney to make all interested parties to the action, so that the various conflicting interests can be determined therein and the rights and liabilities of all established by a single judgment.

By the Court.—The order appealed from is affirmed.

KENESE, Appellant, vs. CUDAHY BROS. COMPANY, Respondent.

April 8—April 30, 1918.

Master and servant: Injury to employee: Release: Procurement through fraud: Degree of proof required: Trial: Changing finding in special verdict.

1. In an action for personal injuries to an employee, where plaintiff claimed that a release executed by him had been procured by fraud, the court properly instructed the jury that "to impeach a formal written instrument on the ground of fraud or mistake the proof must be clear and convincing beyond reasonable controversy."
2. In this case, the unsupported testimony of the plaintiff in denial of a settlement, that the release was not translated or explained to him, and that he believed and understood that the writing he signed was only a receipt for $50 for wages, being refuted by several witnesses whose credibility is corroborated by the facts and circumstances, the trial court properly changed a finding by the jury that the release was procured by fraud.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff to recover damages for personal injuries alleged to have been suffered by him

while in the defendant's employ. The negligence charged was failure to provide a safe place in which to work, safe employment, safe equipment and appliances, failure to warn the plaintiff of the danger incident to his employment, and, more specifically, negligence in putting plaintiff to work removing barrels of meat in which nails protruded from the top and side where plaintiff was required to take hold with his hands. Plaintiff claims that on one of these nails so protruding his right hand was injured, from which blood poison set in, causing severe and permanent injury to his arm and hand. Defendant's answer denies the negligence and sets up as a defense to plaintiff's cause of action a release signed by the plaintiff.

The case was tried before the court and a jury. Defendant's requests for a nonsuit and a directed verdict were denied. By a special verdict the jury found that the release was procured by fraud; that the defendant was guilty of negligence proximately causing the plaintiff's injury; and damages were awarded to the plaintiff in the sum of $2,870. The plaintiff's motion for judgment in conformity with the verdict was denied. The defendant's motion to change various answers of the special verdict was denied excepting as to the answer to question No. 1 of the special verdict, which found that defendant secured the release through fraud. The court entered an order changing the answer to question No. 1 from "Yes" to "No" and directed judgment to be entered upon the verdict so changed, dismissing plaintiff's complaint with costs. From this judgment appeal is taken.

The cause was submitted for the appellant on the brief of *William L. Tibbs* and *Willis E. Lang,* attorneys, and *Daniel W. Sullivan,* of counsel, all of Milwaukee, and for the respondent on that of *L. A. Dahlman* of Milwaukee.

SIEBECKER, J. It is contended that the trial court erred in setting aside the jury's finding to the effect that the re-

lease obtained by defendant in settlement of claims and demands for plaintiff's injury was procured from plaintiff by fraud, and that such error resulted from an improper application by the court of the following rule to the case: "That to impeach a formal written instrument on the ground of fraud or mistake the proof must be clear and convincing beyond reasonable controversy." The trial court so instructed the jury and manifestly applied this rule to the case in setting aside the jury's answer to the first question of the special verdict. It is argued that this rule has not been applied to cases like the instant one and is properly applicable only in equity cases, or as a defense in an action at law where it is first proven or admitted that the parties intended to make an instrument of the nature or kind in question. There is no question that this rule has been applied in equity cases as shown by the numerous authorities in this court, some of which counsel cites to the court's attention. The applicability of the rule to the instant case is also shown in cases that have received consideration in this court, of which the following may be mentioned: In *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074, the plaintiff, a real-estate broker, brought action to recover a commission for procuring a purchaser of defendant's farm; defendant pleaded settlement with plaintiff and that he had plaintiff's receipt acknowledging full payment of the claim. It was urged that the trial court erred in adopting and communicating to the jury the rule of law "as to the quantum and character of evidence necessary to warrant a finding of fraud, inducing the settlement and receipt. The charge merely cautioned the jury that they were to find such fraud only if they were 'satisfied by a preponderance of the evidence' that it occurred; and this, too, in face of a request for further instruction that, notwithstanding a mere preponderance of evidence, the finding of fraud should not be made unless the jury were satisfied by evidence that is clear, satisfactory, and convincing. It is well stated

that certain facts, including fraud, mistake, and the like, are not to be found as readily as the affirmative of ordinary issues not involving turpitude, or the repudiation of deliberate and formal writings, and while the doctrine earlier declared, that the evidence must establish such facts beyond reasonable doubt, has been abandoned, it is held that only upon evidence that is clear and satisfactory can an affirmative finding of fraud properly be made. A court, in submitting the issue of fraud to a jury, does not perform its duty without instruction marking this distinction" (citing numerous cases in this court). This rule was re-affirmed in the following cases dealing with releases pertaining to transactions of the nature and kind involved here: *Steffen v. Supreme Assembly of Defenders,* 130 Wis. 485, 110 N. W. 401; *Demark v. Milwaukee E. R. & L. Co.* 142 Wis. 624, 126 N. W. 13; *Bessey v. M., St. P. & S. S. M. R. Co.* 154 Wis. 334, 141 N. W. 244. The rule followed by the trial court is well established and we discover no good reason for holding it inapplicable in the instant case.

Can it be said that the evidence in the case is clear, satisfactory, and convincing on the question of fraud which induced the plaintiff to sign the release? The jury found as fact that the release was secured by fraud, but the trial court reversed this finding upon the ground that the evidence did not sustain the finding of the jury. There is no dispute but that the plaintiff signed the release, but he avers that he signed it under the belief that he was signing a receipt for $50 which defendant offered to pay him as wages. Plaintiff is unable to understand, speak, read, or write English; he denies that he and Daly, defendant's manager, had any negotiation of settlement before the paper was signed; he states that the contents of the paper were not translated to him by Dr. Junge, his attending physician at the hospital where the paper was signed; that it was not explained to him; that he did not ask the doctor to translate it; that he did not know

it was a release, and that he did not know that he had a claim against the defendant. Plaintiff also states that the doctor told him that Daly paid the $50 when the paper was signed "for the time I was sick," and that he would receive only $5 a week while he was in the hospital. Dr. Junge testified in detail to the negotiations of settlement, the payment of the $50, the offer of a settlement by Daly on the day he first called at the hospital on August 6th and the second day thereafter when the release was signed, the payment of the $50 to plaintiff, and the agreement of Daly to pay the hospital and doctor bills.

It appears that plaintiff had been in the hospital continuously from July 23d, that he had suffered seriously from septicemia in his hand and arm resulting from the injury to his hand caused by the nail wound; that his hand had been operated on and otherwise treated; that his condition on August 6th and 8th had improved so that he was practically free from fever and severe pain, that he was able to sit up and be about his room a part of the time and was in his normal mental state. The evidence of Dr. Junge and Mr. Daly is to the effect that Mr. Daly, by telephone appointment with Dr. Junge, called at the hospital on August 6th to see plaintiff; that the doctor acted as interpreter for the plaintiff and Daly; that Daly proposed as a settlement for the alleged injury to plaintiff from the accident to pay the hospital expenses, the doctor bills, and to pay the plaintiff $50; that plaintiff, after having the offer fully explained to him by the doctor, accepted the offer; that Mr. Daly on August 8th again came to the hospital with the written release introduced in evidence and brought with him an amount in cash over and above the sums needed to pay plaintiff the $50, the doctor bills, and the hospital bills; that the doctor took the release, went to the plaintiff's room alone, and there translated it to the plaintiff and explained to him that if he signed the paper and took the $50 it would be a full settlement of all his claims against the defendant for his injury; that plaintiff thereupon hesitated

to sign the same and stated that he ought to be paid something additional for the time he might remain disabled; that Mr. Daly was then called, came to plaintiff's bedside, and was informed of the plaintiff's request for additional compensation. Daly offered him an additional $5 a week until he left the hospital, to which the plaintiff assented and signed the release. The doctor testified that he informed the plaintiff that he was unable to fix a definite period within which he would be recovered. Daly testified that the doctor read the release in parts to the plaintiff in his presence and then spoke in German to plaintiff as though he translated it. Anna Hein testified that she was called to plaintiff's room on the occasion when the release was signed; that she speaks and understands English and German; that the doctor explained the release to the plaintiff in her presence and hearing; that the plaintiff seemed to understand it; that he signed it in her presence, and that he assented expressly to her signing it. It is unprofitable to state further in detail the evidence of these witnesses as to what occurred and what was said and done on the occasions of the 6th and 8th of August respecting this settlement and the execution of the release. The statements of the plaintiff in denial of a settlement and that the release was not translated or explained to him by Dr. Junge and that he believed and understood that the writing he signed was only a receipt for $50 for wages, are refuted by these several witnesses, whose credibility is corroborated by the facts and circumstances in the case and stand denied only by the bare assertion of the plaintiff. The record fails to show the quantum and character of evidence which is required in order to find that the fraud charged has been established by clear, satisfactory, and convincing evidence. It follows that the trial court properly changed the jury's answer to the first question of the special verdict and that the judgment must stand.

By the Court.—The judgment appealed from is affirmed.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

April 8—April 30, 1918.

Municipal corporations: Street railways: License fees: Invalid ordinance: Police power: Revenue measure: Statute construed: "Road vehicles."

1. **A city ordinance imposing an annual license fee of $15 for each car operated or run by a street railway company is not a regulation of street railways under the police power, but is a revenue measure and is without authority and void, said sum being greatly in excess of the expense of issuing the license and the reasonable cost of inspection and supervision of the business.**
2. **The authority of cities to tax or license street railways for revenue, given by ch. 313, Laws 1860, and sec. 1862, R. S. 1878, was taken away by ch. 363, Laws 1895, and ch. 223, Laws 1897.**
3. **Sub. 40, sec. 3, ch. IV, Milwaukee charter (p. 66), authorizing the city to "tax, license, and regulate road vehicles," is not applicable to street cars.**

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff to recover from the defendant money paid under protest, claimed by the defendant city under a license fee of $15 a car per year for 872 cars.

The only allegations of the complaint put in issue by the answer are the following:

"Plaintiff alleges on information and belief that said ordinance, at the time of the enactment thereof, was, and ever since has been and now is, illegal and unjust and without authority of law and not in the exercise of any authority conferred upon said city of *Milwaukee,* and contrary to the laws of the state of Wisconsin; and that at the time of the enactment of said ordinance said city of *Milwaukee* was and ever since has been and now is without right or authority to impose or collect such license fees, and that at the time of the enactment of said ordinance there was not and ever since there has not been and is not now in existence any require-

ment of law compelling the payment of any such license fee as aforesaid; and that the amount of license fee required by this ordinance, to wit, the sum of fifteen dollars ($15) for each car or other vehicle operated by a street railway company upon the tracks of said company, excepting vehicles or cars used in the operation of sprinkling the streets of the city, was and is unreasonable, excessive, and extortionate, and that such license fee did and does greatly exceed the expense of issuing such license and the reasonable cost of inspection and supervision of street railway companies and the cars and vehicles and operations of street railway companies."

The court below made the following findings:

"1. That the amount of license fee required by the ordinance mentioned and referred to in the complaint, to wit, the sum of fifteen dollars ($15) for each car or other vehicle operated by a street railway company upon the tracks of said company (excepting vehicles or cars used in the operation of sprinkling the streets of the city), was and is unreasonable, excessive, and extortionate, and did at the times in said complaint mentioned and does now greatly exceed the expense of issuing the license referred to in said complaint and the reasonable cost of inspection and supervision of street railway companies and of the cars and vehicles used in, and of the operation of, the plaintiff's business.

"2. That the interest on the sum mentioned in said complaint, to wit, the sum of eight thousand eight hundred five dollars ($8,805), from the date of the payment thereof, to wit, May 17, 1911, amounts to two thousand six hundred eighty-two and 59-100 dollars ($2,682.59)."

The court concluded:

"1. That at the time of the enactment of the ordinance in said complaint mentioned the city of *Milwaukee* was and ever since has been and now is without right or authority to impose or collect such license fees, and that at the time of the enactment of said ordinance there was not and ever since there has not been and is not now in existence any requirement of law compelling the payment of any such license fee as aforesaid.

"2. That said ordinance at the time of the enactment

thereof was and ever since has been and now is illegal and without authority of law and not in the exercise of any authority conferred upon said city of *Milwaukee,* and contrary to the laws of the state of Wisconsin, and is illegal and void.

"3. That the plaintiff is entitled to recover of and from the defendant the sum of eight thousand eight hundred five dollars ($8,805), with interest at the rate of six per cent. (6 %) per annum from May 17, 1911, together with the costs of this action."

Judgment was entered accordingly, from which this appeal was taken.

Clifton Williams, city attorney, for the appellant.

For the respondent there was a brief by *Miller, Mack & Fairchild* of Milwaukee, and oral argument by *Edwin S. Mack.*

KERWIN, J. On March 13, 1911, the city of *Milwaukee* passed an ordinance which was amended April 24, 1911, and which ordinance as amended is entitled "An ordinance providing for the licensing and numbering of street cars and fixing the amount of license fee per car." This ordinance provides, among other things, that no person or company authorized by law to operate a street railway in the city of *Milwaukee* shall operate or cause to be operated or run upon any street in the city of *Milwaukee* after April 30, 1911, any street car or other vehicle without a license for each such car or other vehicle. The ordinance also provides for the manner of applying for the license and the issuance. The license fee fixed by the ordinance is $15 for each car per year.

It is insisted by appellant (1) that the court below erred in finding that $15 per car was unreasonable, excessive, and extortionate, and greatly exceeds the expense of issuing the license referred to in the complaint or the reasonable cost of inspection and supervision of the business; (2) that the circuit judge erred in his conclusion of law to the effect that the

city is without right or authority to impose or collect such license fee; (3) that the court erred in ordering judgment for the plaintiff.

The findings of fact are well supported by the evidence and the conclusions of law necessarily follow from the facts found.

We hold that this case is ruled by *Milwaukee v. Milwaukee E. R. & L. Co.* 147 Wis. 458, 133 N. W. 593.

Under the ordinance in question the fee exacted was a revenue measure, therefore the ordinance cannot be upheld.

It seems clear that the authority of cities to tax or license street railways for revenue given by ch. 313, Laws 1860, and sec. 1862, R. S. 1878, was taken away by ch. 363, Laws 1895, and ch. 223, Laws 1897. *Milwaukee v. Milwaukee E. R. & L. Co., supra.*

But it is claimed that the ordinance can be supported under sub. 40, sec. 3, ch. IV, of the Milwaukee charter (p. 66) as a police regulation under the claim that the city has the right to "tax, license, and regulate road vehicles." While a street railway has many of the features of a "road vehicle" it has many features which are very different. This is obvious from the legislation upon the subject, from which it appears that street railroads were not intended to be classed with road vehicles as regards licensing and taxation. We hold that a street car does not fall within the designation of a "road vehicle" under said charter provision.

Whether under the police power the city still has authority to regulate street railways by ordinance we need not consider, because it is clear that the ordinance under consideration was not passed as a regulation but as a revenue measure.

Many other questions are discussed by the learned counsel for respondent, but we do not deem it necessary to consider them. We are fully convinced that under former decisions of this court as well as legislation referred to the ordinance is void. *Milwaukee v. Milwaukee E. R. & L. Co.*

147 Wis. 458, 133 N. W. 593; *Wis. Tel. Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009.

It follows that the judgment must be affirmed.

By the Court.—Judgment affirmed.

HARPER, Respondent, vs. MCMAHON, Appellant.

April 8—April 30, 1918.

Landlord and tenant: Agreement to furnish heat: Construction: Breach: Eviction.

1. Under a lease in which the landlord agrees to furnish heat in a city apartment, the tenant is entitled to sufficient heat to make the rooms generally comfortable to dwell in for ordinary persons, due regard being had to the kind of use for which each room is intended, and excluding lapses due to sudden and severe changes in temperature, to occasional inattention by the janitor, or to the necessity of making repairs to the heating plant, or to other unforeseen or excusable causes.
2. To constitute an eviction in such a case by reason of lack of heat the apartment need not be continuously cold.
3. A tenant is entitled to the use of the entire premises rented by him, and the landlord cannot excuse a wrongful eviction from a portion thereof by the plea that the tenant can use the remainder.
4. The evidence in this case is *held* to show a failure by the landlord to furnish adequate heat, constituting a breach of the lease and an eviction.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Action begun in the civil court to recover a balance of rent due on the lease of a flat, vacated by defendant because he claimed adequate heat was not furnished as provided for in the lease. Defendant rented the flat in August, 1913; paid rent till the 1st day of March, 1914, and vacated it the latter part of February of that year. The civil judge found as facts "that from and after the third week in December of the

year 1913 the said plaintiff failed and neglected to furnish heat to the said apartment as required by said lease, and continuously thereafter failed and neglected to so operate the heating apparatus of said building so as to furnish heat reasonably required for the habitation of said apartment." He further found that defendant notified the agent in charge of the flat of the lack of heat at least once in December, 1913, once in January, 1914, and twice in February, 1914, and he also notified the janitor at least six different times and that at least two of such notices to the janitor were by him communicated to the agent in charge of the flats. As conclusions of law he found that plaintiff's failure to furnish adequate heat constituted a breach of the lease and an eviction and that defendant was entitled to a judgment dismissing the action upon the merits. From a judgment entered accordingly the plaintiff appealed to the circuit court. It held the evidence did not show a breach of the lease or an eviction and entered judgment for plaintiff for the balance of the rent due after March 1, 1914. The defendant appealed.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Arthur B. Doe,* of counsel, all of Milwaukee, and oral argument by *Mr. Doe.*

For the respondent there was a brief by *W. J. McElroy,* and oral argument by *L. R. Potter,* both of Milwaukee.

VINJE, J. The learned circuit judge must have proceeded upon an erroneous idea of what constitutes an eviction by reason of lack of heat in reaching the conclusion that there was no breach of the lease in this case because of deficient heating. He says in his opinion, "There is testimony that the apartment was cold upon occasions, but I do not think it justifies the conclusion that it was *continuously* cold so as to make it not habitable." A dwelling need not be continuously cold in order to be uninhabitable within the meaning of a

lease agreeing to furnish heat in a city apartment. Under such an agreement the tenant is entitled to sufficient heat to make the apartment generally comfortable to dwell in for ordinary men, women, and children. That there may be lapses from such a condition owing to the severity and sudden changes of our climate, to occasional inattention on the part of the janitor, to necessary repairs of the heating apparatus, or other excusable causes, without constituting an eviction, is well settled. Such was the ruling in *Northwestern R. Co. v. Hardy,* 160 Wis. 324, 151 N. W. 791. The circuit judge further states that "the occasional freezing up of the maid's bathroom would not be sufficient to justify the conclusion that there was an eviction. There was another bathroom which she was at liberty to use." It is true that occasional freezing up of the maid's bathroom might not constitute an eviction, but not because her mistress, as in this case, allowed her to use her bathroom, but because the freezing was only occasional and excusable. A tenant is entitled to the use of the entire premises rented by him, and the landlord cannot excuse a wrongful eviction from a portion thereof by the plea that the tenant can use the remainder. We reach the conclusion that the learned circuit judge erred in his conception of what constituted an eviction the more readily because the evidence, practically without dispute, sustains the findings of the civil court as to the lack of heat. That being so, we cannot assume that the circuit judge was unmindful of the oft-repeated rule that findings of fact made by the civil court should not be set aside by the circuit court upon appeal unless against the clear preponderance of the evidence. *Pabst B. Co. v. Milwaukee L. Co.* 156 Wis. 615, 146 N. W. 879; *Mechanical A. Co. v. A. Kieckhefer E. Co.* 164 Wis. 65, 159 N. W. 557. Here the evidence showed that the defendant and his family were troubled almost constantly by a low temperature. They had to go to bed at 10 or a quarter past to keep warm. Early in the morning the temperature was

from 40 to 50 degrees. In the afternoon it would go up to 60, 62, or 63 degrees, and then in the evening it would get warm. One bathroom froze up three times in one week, and the maid's bathroom was frozen up for two weeks, and she could not sit in her room at all evenings without wraps on, and the family often had to sit in their wraps to keep warm. This lack of heat was not denied by the evidence of plaintiff. All it tends to show is that the heating plant, if properly run, was adequate to heat the apartment, and that it was customary to shut off heat at night except in the coldest weather. In view of the uncontradicted evidence as to the continued lack of heat and the repeated notice thereof to plaintiff, the circuit court should have affirmed the judgment of the civil court. There can be no doubt that under the evidence, only a portion of which is here given in substance, there was in this case a failure to furnish the required amount of heat. That amount, as before stated, is such as will render the temperature of the rooms reasonably comfortable for the average person generally during the time they are customarily occupied, due regard being had to the kind of use for which each room is intended and excluding lapses due to sudden and severe changes in temperature, to occasional inattention by the janitor, or to the necessity of making repairs to the heating plant, or to other unforeseen or excusable causes. Otherwise the temperature must be maintained at such a degree as will render the rooms reasonably comfortable for the ordinary tenant during the time they are usually occupied for the intended purposes.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the judgment of the civil court.

ELLIS, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant, and WISCONSIN TRACTION, LIGHT, HEAT & POWER COMPANY, Respondent.

March 5—May 21, 1918.

Assignment of causes of action: Validity: Good faith: Real party in interest: Carriers of passengers: Injuries: Collision between railway train and interurban car: Excessive speed: Negligence: Proximate cause: Contribution between joint wrongdoers.

1. Separate actions by two persons injured in a collision between a railway train and an interurban car of a traction company were brought both against the railway company and the traction company. Trial of one action resulted in a verdict against the traction company and a nonsuit as to the railway company, no evidence as to the latter's negligence having been offered, and afterwards that action was discontinued. Thereafter a stockholder of the traction company purchased and took an assignment of both claims, borrowing the money for that purpose from the traction company and giving his note therefor. He then brought actions against the railway company, in each of which the traction company was afterwards brought in as a defendant; and later such actions were consolidated. There being positive, undisputed evidence that plaintiff bought the claims in his own right and at his own risk, the mere fact that he took the assignments because of his interest in, and with a view to aiding, the traction company did not render such assignments void or ineffectual or justify the trial court in changing findings by the jury that the assignments were not taken in behalf of the traction company and that plaintiff and not the traction company was the real party in interest.
2. A finding by the jury, sustained by the trial court, that at the time of the collision the railway train was running at a speed in excess of twelve miles per hour, cannot be disturbed on appeal, the evidence on that question being conflicting.
3. The running of a railway train at an excessive rate of speed, in violation of law, at the time of a collision with an interurban car was negligence; and it was a proximate cause of the accident where the collision would not have occurred had the train been running at lawful speed.
4. The rule that there can be no contribution between joint tortfeasors is not applicable to a case in which there was no moral turpitude and no wilful or conscious wrong.

5. Thus, where judgment is rendered against both a railway company and a traction company for damages on account of personal injuries sustained in a collision between a train and an interurban car, and though both were negligent, one in failing to ascertain that the train was coming and the other in running the train at an unlawful speed, yet it appears that there was no wilful or conscious wrong, the company which pays the whole judgment may compel contribution from the other.

VINJE, ROSENBERRY, and ESCHWEILER, JJ., dissent in part.

APPEALS from a judgment of the circuit court for Outagamie county: E. V. WERNER, Circuit Judge. *Reversed on both appeals.*

In a collision between the defendant *Chicago & Northwestern Railway Company,* hereinafter called *Railway Company,* and the *Wisconsin Traction, Light, Heat & Power Company,* hereinafter called *Traction Company,* Al. M. Frederick and Ben Schneider were injured and each commenced suit against both companies to recover damages. One of said suits was tried, in which a nonsuit was granted as to the *Railway Company* and verdict rendered in favor of Schneider against the *Traction Company* for $4,200 damages. Afterwards the plaintiff took an assignment of both claims.

Separate actions were commenced by plaintiff against the defendant *Railway Company* on the claim of each of said injured persons. The original complaints were the same, except as to description of the injuries sustained by the respective assignors, and charged negligence of the defendant *Railway Company.*

Several defenses to the complaints were set up. Afterwards, on application of defendant *Railway Company,* the defendant *Traction Company* was made a party to both actions, and the plaintiff served an amended complaint in each case setting up negligence on the part of the *Traction Company* as well as negligence of the *Railway Company,* and that the negligence of both defendants concurred and was a proximate cause of the collision and the injuries suffered.

The *Railway Company* answered the amended complaint, and among other defenses set up that the *Traction Company* and not the plaintiff was the real party in interest.

The *Traction Company* answered in each case denying negligence and setting up a cross-complaint against the *Railway Company* charging it with active negligence causing the collision and injuries, and further alleging that if any inadvertence on the part of the *Traction Company* contributed to the collision and injury such inadvertence was secondary and passive, by reason of which affirmative primary fault of the *Railway Company* the judgment should provide for execution to first issue against the *Railway Company* and not against the *Traction Company* until a showing was made of inability of the plaintiff to collect from the *Railway Company.* The answer further alleged that if it shall be determined that the assignments to the plaintiff were not made in good faith and that the cause of action had been in effect assigned and released to the *Traction Company,* then and in such event it must be determined and this defendant alleges the fact to be that the collision and injuries were proximately caused by the negligence of the *Railway Company* in the same or a greater degree than by the negligence of the *Traction Company,* and that the *Railway Company* and *Traction Company* were not at the time of the collision joint tortfeasors, and that if any negligence on the part of the *Traction Company* contributed to produce the collision such negligence consisted of mere inadvertence and was a mere concurrence with the original primary and active negligence of the defendant *Railway Company.*

The *Railway Company* demurred to the cross-complaint of the *Traction Company* in both cases, which demurrer was overruled.

Afterwards the *Traction Company* amended its answer by inserting a second cause of action in its cross-complaint against the *Railway Company,* in which it was alleged in

substance that if it should be determined that the causes of action set forth in the complaint were not assigned in good faith to the plaintiff, but assigned and released to the *Traction Company,* and if it should further be determined that the negligence of the *Traction Company* was an active and primary cause of the collision, then the negligence of the *Railway Company* concurred with the negligence of the *Traction Company,* and that the negligence of each was inadvertent and unaccompanied by any intent to violate the law or rights of the assignors.

There are some other allegations to the effect that the operators of the engines, trains, and cars of the respective companies perform or ordinarily attempt to perform the duty of keeping a lookout for the engines, trains, and cars of the other company, and in addition thereto the conductor in charge of the cars of the *Traction Company,* in pursuance of the custom and practice, flags his car or train across the intersection of the tracks of the two companies.

The *Railway Company* demurred to the cross-complaint contained in the amended answer of the *Traction Company,* which was sustained and an order entered directing judgment thereon in favor of the defendant *Railway Company* with leave to the *Traction Company* to amend its cross-complaint.

The answer of the *Traction Company* was not amended and the case went to trial on the issues made. Afterwards upon application of the plaintiff an order was made consolidating the actions. The case went to trial and the following verdict was returned:

"(1) Was Al. M. Frederick and Ben Schneider injured in a collision at the intersection of the *Traction Company* and *Railway Company* tracks on Commercial street in the city of Neenah, Wisconsin, January 21, 1915? *A.* (by the court). Yes.

"(2) Did the conductor of the *Traction Company* in charge of the street car, charged with the duty to exercise

the highest degree of care reasonably to be expected from human vigilance and foresight in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of the business of operating the defendant *Traction Company's* street railway for the safety of its passengers in said car, fail to discharge such duty in ascertaining whether the train of the defendant *Railway Company* was coming on and over the crossing on the night of the collision? *A.* Yes.

"(3) If you answer question No. 2 'Yes,' then answer this question: Was such failure the proximate cause of the injuries sustained by Al. M. Frederick and Ben Schneider? *A.* Yes.

"(4) Did the motorman of the defendant *Traction Company* in charge of the street car, charged with the duty to exercise the highest degree of care reasonably to be expected from human vigilance and foresight in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of the business of operating the defendant *Traction Company's* street railway for the safety of its passengers on said car, fail to discharge such duty in ascertaining whether the train of the defendant *Railway Company* was coming on and over the crossing on the night of the collision? *A.* No.

"(5) [Not answered.]

"(6) Did the defendant *Railway Company* fail to keep a flagman stationed upon Commercial street, at said crossing, on the night of the collision to warn all persons of the approach of the trains of the defendant *Railway Company*, contrary to the ordinance of the city of Neenah, Wisconsin? *A.* (by the court). Yes.

"(7) Was the defendant *Railway Company* guilty of want of ordinary care in failing to maintain a flagman at said crossing? *A.* Yes.

"(8) If you answer question No. 7 'Yes,' then answer this question: Was such want of ordinary care the proximate cause of the injury sustained by Al. M. Frederick and Ben Schneider? *A.* No.

"(9) Was the defendant *Railway Company's* train operated at a speed in excess of twelve miles per hour when ap-

proaching Commercial street crossing and within twenty rods thereof? *A.* Yes.

"(10) If you answer question No. 9 'Yes,' then answer this question: Was such excessive speed the proximate cause of the injuries sustained by Al. M. Frederick and Ben Schneider? *A.* No.

"(11) Did the engineer fail to exercise ordinary care in the operation of his engine as he approached the point of collision? *A.* No.

"(12) [Not answered.]

"(13) Was the defendant *Railway Company,* or any of its officers, servants, or employees, guilty of any want of ordinary care in storing or permitting the box cars to remain south of Commercial street crossing on the center track of the defendant *Railway Company* on the night of the collision? *A.* No.

"(14) [Not answered.]

"(15) What damages did Al. M. Frederick sustain? *A.* $7,425.

"(16) What damages did Ben Schneider sustain? *A.* $4,200.

"(17) Was the assignment of the claims of Frederick and Schneider to the plaintiff taken by the plaintiff for and in behalf of the defendant *Traction Company?* *A.* No.

"(18) Which of the following parties is the real party in interest in this action, to wit: *A. K. Ellis* or the *Wisconsin Traction, Light, Heat & Power Company?* *A. A. K. Ellis.*"

After verdict all the parties filed alternative motions to change the answers to certain questions in the special verdict, the motion of the defendant *Railway Company* being (1) for judgment upon the verdict and undisputed evidence; (2) for an order changing the answers to questions 7 and 9 in the special verdict from "Yes" to "No;" (3) for judgment notwithstanding the verdict; and (4) to change the answer to question 17 from "No" to "Yes" and the answer to question 18 from "*A. K. Ellis*" to "*Wisconsin Traction, Light, Heat & Power Company.*"

The court changed the answer to question number 10 from

"No" to "Yes," and also changed the answer to question number 17 from "No" to "Yes."

The court further ordered that the plaintiff was not entitled to recover and that his rights were merged with those of the *Traction Company,* and ordered judgment in favor of the *Traction Company* and against the *Railway Company* for one half of the amount paid by the *Traction Company* in settlement of the two claims, which was the same amount assessed as damages in the special verdict. Judgment was entered accordingly, from which plaintiff and the defendant *Chicago & Northwestern Railway Company* appealed.

P. H. Martin of Green Bay, of counsel for the appellant *Ellis.*

R. N. Van Doren of Milwaukee, for the appellant *Chicago & Northwestern Railway Company.*

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke,* attorneys, and *Ralph M. Hoyt,* of counsel, all of Milwaukee, and oral argument by *James D. Shaw.*

KERWIN, J. It is established by the verdict in this case that Frederick and Schneider were injured; that the conductor of the *Traction Company* failed to discharge his duty in ascertaining whether the train of the *Railway Company* was coming over the crossing, and that such failure was a proximate cause of the injuries sustained; that the *Railway Company* failed to keep a flagman stationed at the crossing in question at the time of the collision, contrary to an ordinance of the city of Neenah, and was guilty of want of ordinary care in failing to do so, but that such want of ordinary care was not a proximate cause of the injuries; that the *Railway Company* was operating its train at a speed in excess of twelve miles per hour in approaching the crossing and within twenty rods thereof, but that such excessive speed was not a proximate cause of the injury, and that the engi-

neer did not fail to exercise ordinary care in the operation of his engine as he approached the point of collision; that the *Railway Company* or its officers, servants, or employees were not guilty of want of ordinary care in permitting box cars to remain south of Commercial street crossing on the center track of the defendant *Railway Company* at the time of the collision; that the damages sustained by Frederick were $7,425 and by Schneider $4,200; that the assignments of the claims of Frederick and Schneider were taken by the plaintiff, and that the plaintiff is the real party in interest.

The court below on motion changed the answers of the jury to the effect that the plaintiff was not the real party in interest and that the excessive rate of speed was a proximate cause of the injury.

The vital points in controversy in this case are: (1) Was *Ellis* or the *Traction Company* the real party in interest? (2) Is the finding of excessive speed supported by the evidence? (3) Was the court right in changing the answer of the jury on the question of proximate cause? (4) Was the *Traction Company* entitled to contribution?

1. Separate suits were brought by the injured parties, Frederick and Schneider, against both the *Railway Company* and *Traction Company*. The Schneider suit was tried, a verdict rendered against the *Traction Company*, and the case afterwards discontinued, a nonsuit having been granted as to the *Railway Company*. It seems that upon the trial of the case no evidence was offered regarding the negligence of the *Railway Company*. Afterwards the plaintiff, *Ellis*, purchased the claims of Frederick and Schneider, took an assignment thereof, borrowed the money from the *Traction Company* and gave his note therefor, and paid said injured parties the amount agreed upon as consideration of the purchase.

The plaintiff was a stockholder in the *Traction Company* and of course was interested in it. Undoubtedly the belief on the part of the plaintiff that the purpose of the injured

parties was to collect both claims out of the *Traction Company* and save the *Railway Company* harmless had an influence upon him in purchasing the claims. It is true, as conceded by counsel for the *Railway Company* in his brief, that the evidence respecting the assignment to the plaintiff is undisputed. This evidence shows that *Ellis* purchased the claims in his own right and at his own risk and without any agreement or understanding that he should be indemnified in any way by the *Traction Company* or any one else. The evidence shows that the matter of indemnity came up and was discussed between plaintiff and the attorney for the *Traction Company,* and it was distinctly stated that if plaintiff purchased the claims he must do so at his own risk. The transaction was in writing and on its face showed a *bona fide* sale of the claims to the plaintiff and payment by him. True, plaintiff borrowed the money from the *Traction Company* and gave his note therefor. The evidence being undisputed and showing a valid transaction, the only question left was one of intention as to whether the transaction was *bona fide,* and clearly that was a question for the jury which was resolved in favor of the plaintiff. *Hoff v. Hackett,* 148 Wis. 32, 34, 134 N. W. 132; *Northwestern I. Co. v. Industrial Comm.* 154 Wis. 97, 104, 142 N. W. 271. Where conflicting inferences may be drawn from the facts proved the question is one for the jury. *Northwestern I. Co. v. Industrial Comm., supra.*

The learned trial judge below seems to have labored under the impression that because *Ellis* was interested in the *Traction Company* and because he conferred with other officers of the company who had full knowledge of the facts that the assignments were required for the purpose of avoiding any question of contribution, therefore *Ellis* took the assignments for the *Traction Company* and that the transfer to him was a mere cover. We think the learned trial judge was in error in his conclusion in this regard. The mere fact that

plaintiff was interested in the *Traction Company* and took the assignments because of such interest and with a view of aiding the *Traction Company* did not render the assignments to him void or ineffectual, if in fact he purchased the claims and took the assignments for himself and at his own risk, even although he might have believed that such purchase would eventually operate for the benefit of the *Traction Company.*

Counsel for the *Railway Company* refers to the assignment as being a mere cover and fictitious. That is a rather sweeping statement in a case like the present, where the evidence of a valid assignment is shown by undisputed evidence and the claim that it was fictitious based almost, if not wholly, upon the fact of the relations existing between plaintiff and the *Traction Company,* and when there is positive evidence, undisputed, that the assignment was taken by plaintiff for himself in his own right and at his own risk. Counsel says in looking at such transactions we must look beneath the surface. It will not do, however, in looking beneath the surface to brush aside positive, credible evidence and draw inferences contrary to the findings of the jury on such evidence.

There is no doubt but that plaintiff had a right to purchase the claims in question even though he intended to benefit the *Traction Company* by so doing. The evidence is ample to establish that he bought the claims in his own right and at his own risk, and the court below was in error in changing the answers of the jury to the seventeenth and eighteenth questions of the verdict. *Kroger v. Cumberland F. P. Co.* 145 Wis. 433, 441, 130 N. W. 513; *Habeck v. C. & N. W. R. Co.* 146 Wis. 645, 652, 132 N. W. 618; *Kersten v. Weichman,* 135 Wis. 1, 4, 114 N. W. 499; *Karlen v. Hadinger,* 147 Wis. 78, 79, 132 N. W. 591.

2. The jury found that the defendant *Railway Company* was running at an excessive rate of speed, viz. in excess of

twelve miles per hour, at the time of the collision. The court below sustained this finding of the jury. There is evidence on the part of the *Railway Company* that the speed limit was not exceeded, while on the part of the plaintiff there is evidence tending to show that it was. The evidence upon this question being conflicting, under well established rules we cannot disturb the finding of the jury and the court below in this regard.

3. It is further contended by counsel for the *Railway Company* that the finding of the jury on the tenth question of the special verdict, to the effect that the excessive rate of speed was not a proximate cause of the injury, should not have been changed.

The court below found that the excessive rate of speed was a proximate cause of the injury. Counsel for the *Railway Company* criticises this finding on the ground that there is no finding as to how much such speed exceeded twelve miles per hour. A careful review of all the evidence shows that the excessive rate of speed was sufficient to cause the collision. It quite clearly appears that had the train been running twelve miles per hour only, the street car would have passed the zone of danger several seconds before the engine reached the point of collision and no collision would have occurred.

Upon the established facts we hold that the excessive rate of speed, in violation of law, was a proximate cause of the injury. It having been established that the *Railway Company* was violating the law, sec. 1809, Stats., in running at an unlawful rate of speed when the collision occurred, negligence *per se* on the part of the *Railway Company* was established. *Ludke v. Burck,* 160 Wis. 440, 152 N. W. 190; *Riggles v. Priest,* 163 Wis. 199, 157 N. W. 755.

When, as in the instant case, the unlawful rate of speed caused or contributed to the injury, proximate cause follows as matter of law. *Allen v. Voje,* 114 Wis. 1, 89 N. W. 924.

4. The question of contribution between the *Railway Com-*

pany and the *Traction Company* is raised by the pleadings and discussed in this case, and while it does not seem necessary to decide it now, since we hold that plaintiff is the real party in interest, if not decided it will, doubtless, be raised and litigated later in this case.

In our view of the case judgment must go in favor of plaintiff and against the *Railway Company* and the *Traction Company* and may be collected from either, and the question arises whether the company paying the whole judgment may compel the other to contribute. There is much conflict of authority upon the subject. The question has not been settled by this court, although the principle recognizing contribution where there is no wilful or conscious wrong is recognized in former decisions of this court. *Estate of Ryan,* 157 Wis. 576, 147 N. W. 993; *North Hudson Mut. B. & L. Asso. v. Childs,* 82 Wis. 460, 52 N. W. 600.

Of course the rule is generally referred to in elementary law books and decisions of courts of last resort to the effect that there can be no contribution between joint wrongdoers, or, as some courts put it, joint tortfeasors. And a general rule is laid down to that effect. But this rule, like other rules, has its exceptions, and the authorities from the English decisions down recognize the exceptions. The logic of the rule that there can be no contribution between tortfeasors is based upon the idea that the law will not imply contribution between wrongdoers. *Merryweather v. Nixan,* 8 T. R. 186; *Adamson v. Jarvis,* 4 Bing. 66. The rule of the English cases against contribution, however, "is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." Perhaps the strongest English case against contribution is *Merryweather v. Nixan, supra,* but the general rule laid down in that case was afterwards limited and explained in later cases, and it may now be regarded settled in England that there can be contribution between tortfeasors where there was no wilful

or conscious wrong. *Adamson v. Jarvis, supra; Betts v. Gibbins,* 2 Ad. & E. 57, 65; *Palmer v. Wick & P. S. S. Co. Ltd.* [1894] App. Cas. 318; *Burrows v. Rhodes,* [1899] 1 Q. B. 816.

In *Palmer v. Wick & P. S. S. Co. Ltd., supra,* where the injury was due to the negligence of two parties and judgment rendered against them, one party paid the judgment and sued for contribution. Lord HERSCHELL, in delivering the opinions of the Lords, said:

"On principle I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each codebtor should not pay his share; or why, if one be compelled by the creditor to pay the whole debt, the other should be enabled to go free by setting up his own wrong. . . . It is not necessary in this appeal to decide whether there can be any right to contribution in the case of a delict proper when the liability has arisen from a conscious and therefore moral wrong, nor even whether in every case of *quasi*-delict a delinquent may obtain relief against his co-delinquent, though I see, as at present advised, no reason to differ from the opinion, which I gather my noble and learned friend Lord WATSON holds, that such a right may exist. In circumstances such as those with which your lordships have to deal, I cannot but think that equity and justice are in favor of the conclusion arrived at by the Inner House, and there seems to be no authority compelling a contrary decision. It was urged that the person seeking relief might be the more culpable of the delinquents; but it is just as likely that he should be the less culpable. In selecting from which of his codebtors he will obtain payment, the creditor would be guided usually by considerations wholly independent of the relative culpability of those from whom he may recover it.

"Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of *Merryweather v. Nixan.* The reasons to be found in Lord KENYON'S judgment, so far as reported, are somewhat meager, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland,

I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. . . ."

Coming now to authorities in this country, it must be conceded that there is lack of harmony. A review of all, or the larger portion, of the cases cited by counsel would serve no useful purpose. It is sufficient to say that while the general rule is laid down in many cases and apparently without referring to the exceptions, a large number of the courts of last resort hold that where there is no wilful or conscious wrong there may be contribution between tortfeasors.

In *Jacobs v. Pollard,* 10 Cush. 287, the court referred to the general rule that it was the policy of the law to discountenance all actions in which a party seeks to enforce a demand originating in a wilful breach or violation, on his part, of the legal rights of others, and that courts will not lend their aid to those who found their claims upon illegal transactions, but further said: "It is only when a person knows or must be presumed to know that his act was unlawful that the law will refuse to aid him in seeking an indemnity or contribution."

In *Acheson v. Miller,* 2 Ohio St. 203, the court said:

"The rule that no contribution lies between trespassers, we apprehend, is not one of universal application. We suppose it only applies to cases where persons have engaged together in doing wantonly or knowingly a wrong. The case may happen that persons may join in performing an act which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party who may have a right to an action of tort against them. In such case, if one of the parties has been compelled to pay the amount of the damage, is it not reasonable that those who were engaged with him in doing the injury should pay their proportion? The common understanding and justice of humanity would say that it would be just and right that each of the parties to the transaction should pay his proportion of

the damages done by their joint act; and we see no reason why the moral sense of a court shall be shocked by such a result. And we think this view of the case is fully sustained by the cases cited by counsel for the defendant in error" (quoting *Adamson v. Jarvis, supra*). "From these and other cases referred to, we think the reasonable and common-sense rule and the legal one are the same, viz.: that when parties think they are doing a legal and proper act contribution will be had; but when the parties are conscious of doing a wrong courts will not interfere."

In 13 Corp. Jur. pp. 829, 830, §§ 18–25, the subject is treated and many authorities cited. After stating the general rule that there can be no contribution between tortfeasors, and the reason for such rule, the doctrine is stated thus:

"The general rule that there can be no contribution among wrongdoers has many exceptions. There is not complete unanimity among the decisions regarding facts which will allow or defeat the right to contribution among tortfeasors, much of the confusion being due to a failure to differentiate between the liability of tortfeasors to third persons and for contribution among themselves. It has been stated that the principle that no right of contribution exists as between wrongdoers is confined to cases where the transaction is actually illegal or void, or where the fraud is so great that on moral grounds the court will not entertain a suit for the relief of the tortfeasor, and that in cases of *quasi*-torts only, not involving any moral turpitude or any personal fault, or where the acts are not obviously unlawful, or the parties are not presumed to have known they were doing any wrong, or where their liability is by implication of law merely, then contribution will be enforced."

Many cases are collected and the general rule and exceptions stated in 6 Ruling Case Law, pp. 1054, 1055, sec. 17, thus:

"It may be said to be the general rule that one of several joint tortfeasors cannot enforce contribution or secure indemnity from any of the other tortfeasors. When parties are equally bound to bear a burden, and are *in æquali jure,* that

is, liable from the same circumstances existing as to both, contribution is due of right, in equity, but the party who would otherwise be entitled to contribution forfeits such right if the joint liability arose from an act *malum in se,* a fraud or voluntary tort, in which he participated. The rule is, *In pari delicto potior est conditio defendentis.* These general principles are, however, subject to many exceptions or limitations which confine the operation of the general rule within very narrow limits. If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. In respect to offenses in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum,* and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers. An exception to the general rule occurs when in the beginning the cotrespassers were not in the wrong, as when they engage in a legitimate undertaking in the pursuance of which they commit a tort unintentionally. Here if one is made to pay the damages he has an undoubted right to contribution. It has been said that the test for determining whether there shall be contribution between cotrespassers is the rule that when parties think that they are doing a legal and proper act contribution will be had; but when the parties are conscious of doing a wrong courts will not interfere. However, the true test would seem to be, Are the parties, as between themselves, wrongdoers? If they are, then they must take advantage of their own wrong in order to recover contribution; if they are not, then it is not necessary for them to allege their own wrong. Whether or not they are as between themselves wrongdoers is determined by the test whether or not they knew or must be presumed to have known that the act was wrongful, and the rule does not apply to a person made a wrongdoer by inference of law only."

In *Herr v. Barber,* 2 Mackey, 545, a joint judgment was obtained against three tortfeasors, was paid by one, and contribution sought, and while it was held that contribution in

that case could not be had, as the tort consisted in a breach of trust, the court, in discussing the question, said:

"The principle that there can be no contribution, at law, enforced by one tortfeasor against the other wrongdoers is limited by the more modern authorities to cases where the transaction out of which the judgment arises involves moral turpitude."

Nickerson v. Wheeler, 118 Mass. 295, is an action involving the right of contribution between tortfeasors, and the court, after referring to *Merryweather v. Nixan,* 8 T. R. 186, said:

"But although one may have been made liable in tort, he is not necessarily deprived of contribution from another also originally liable, where the foundation of the action is simply negligence on the part of each in carrying on some lawful transaction."

In *Mayberry v. N. P. R. Co.* 100 Minn. 79, 110 N. W. 356, the court said:

"There is, it is true, a general rule that the right of contribution does not exist as between joint tortfeasors; but it applies only between persons who by concert of action intentionally commit the wrong complained of."

In *Paddock-Hawley I. Co. v. Rice,* 179 Mo. 480, 78 S. W. 634, it is held that contribution may be had between tortfeasors where there was "no guilty intent in the tortious act."

In *First Nat. Bank v. Avery P. Co.* 69 Neb. 329, 95 N. W. 622, in referring to liability to contribution the court said:

"The general rule that contribution among tortfeasors will not be enforced does not apply where, as in this case, the parties acted in good faith, without any intention of committing a trespass."

The following cases also sustain the doctrine that where the element of moral turpitude is not involved and there is no wilful or conscious wrong between the parties against whom a judgment in a tort action is recovered, there may be contribution between the tortfeasors: *Nashua I. & S. Co. v.*

W. & N. R. Co. 62 N. H. 159; *Furbeck v. I. Gevurtz & Son,* 72 Oreg. 12, 143 Pac. 654.

Counsel for the *Railway Company* relies strongly upon *Union Stock Yards Co. v. C., B. & Q. R. Co.* 196 U. S. 217, 25 Sup. Ct. 226, while counsel for the *Traction Company* claim that this case is distinguishable from the instant case mainly on the ground that in the *Stock Yards Case* the action was for indemnity, not for contribution. The facts in that case are quite different from the facts here, but whether or not it can be distinguished from the instant case we think doubtful. If it cannot, we are not inclined to follow it, since we believe the doctrine stated in the decisions heretofore cited is the more equitable and just doctrine and well supported by authority from the English cases down. The facts out of which the injuries in the present case arose involve no moral turpitude, wilful or conscious wrong on the part of either the *Railway Company* or the *Traction Company,* and under such circumstances we think the rule allowing contribution should be followed.

It is true that in the instant case the jury found that the *Railway Company's* train was running at an unlawful rate of speed, therefore there was a technical violation of law. It is quite clear, however, from the record that the acts of the *Railway Company* in this regard were not wilful or intentional and involved no conscious wrong. The same may be said of the *Traction Company.* So it appears from the established facts that the inadvertent acts of both companies concurred in producing the injuries, hence the case is a proper one for contribution between the *Railway Company* and the *Traction Company.*

It follows, therefore, that the judgment must be reversed on both appeals, and the cause remanded with directions to the court below to enter judgment in favor of the plaintiff against the *Railway Company* and the *Traction Company* for the amount of both claims assigned to the plaintiff, and the plaintiff may collect the whole judgment from the *Rail-*

way Company or the *Traction Company* and cause execution to issue against either. The company which pays the judgment may have contribution from the other.

By the Court.—The judgment is reversed on both appeals, and the cause remanded with instructions to enter judgment in accordance with this opinion with costs in favor of plaintiff against the *Railway Company.*

VINJE, ROSENBERRY, and ESCHWEILER, JJ., dissent from that part of the decision holding that *Ellis* was a *bona fide* assignee of the causes of action. Upon the facts found by the court they concur in the doctrine of contribution.

WILLIAMS, Appellant, vs. THRALL and others, Respondents.

April 4—May 21, 1918.

Execution: Sale of land: Redemption: Statement of amount: When binding on sheriff: Payment to agent: Special verdict: Refusal of tender: Liability for loss of title: Equity: Quieting title: Parties: Pleading: Amendment: Limitation of actions.

1. Where, within a year after the sale of land on execution, the owner informs the sheriff that he wishes to redeem and the sheriff undertakes to compute and to state the amount necessary to be paid, he is bound by such statement, and the payment or tender by the owner of the amount so stated constitutes a redemption, even though said amount was less than the proper amount.

[2. Whether or not the sheriff is bound in such a case to furnish the owner with a statement of the amount necessary to redeem, is not decided.]

3. Findings in a special verdict to the effect that a sheriff made the clerk of court his agent to receive money in redemption of land from an execution sale, and that the money was paid to said clerk, are not inconsistent, the latter finding meaning that the manual delivery of the money was to the clerk, but to him as agent of and for the sheriff.

4. Refusal of a sheriff to accept money tendered in redemption of land sold on execution does not create a liability against him and his bondsmen unless the owner thereby lost title to the land or some part of it; and there was no such loss of title as against the purchaser at the execution sale if such tender in fact constituted a redemption.
5. If in such case there was in fact a redemption and the title to any portion of the land has been lost by sales to innocent purchasers, the owner has a claim against the sheriff and his bondsmen for the damages resulting from such loss.
6. For a proper determination of the facts in such a case there should be an action in equity to quiet title and, incidentally, for damages against the sheriff in case the title has been lost; and in such action, besides the sheriff and his bondsmen, the purchaser at the execution sale and all other persons in possession or claiming any interest in the land should be made parties. Where an action has been brought against the sheriff and his bondsmen only, the court may order the pleadings to be amended and new parties brought in, as stated.
7. The action in such case would not be barred until the expiration of ten years, under sub. 4, sec. 4221, Stats.

APPEAL from an order of the circuit court for Green Lake county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is from an order setting aside the verdict and granting a new trial.

The action was brought against the defendant *Thrall* as sheriff and his sureties on the official bond of the sheriff. The defendant sheriff sold real estate of the plaintiff on execution. The certificate of sale to the purchaser, H. R. Laing, bore date September 19, 1908. The land sold for $820. Plaintiff took steps to redeem from the sale prior to September 19, 1909. The defendant sheriff, through his agent, the clerk of the court, computed the amount necessary to redeem, and plaintiff paid $85 and agreed to send the balance before time to redeem expired, which she did.

The evidence shows without dispute that the value of the plaintiff's equity of redemption in the land sold was $6,824. The plaintiff claimed judgment for the amount of the value of the equity of redemption.

The jury found (1) that the plaintiff informed the defendant *Thrall* that she wished to redeem the land from sheriff's sale; (2) that defendant *Thrall* made Yahr, the clerk of the court, his agent for receiving money from plaintiff in redemption of lands from the sheriff's sale; (3) that the $85 was paid to the clerk of the court, Yahr, and the value of the plaintiff's interest in the property which she sought to redeem was $3,000.

Plaintiff moved after verdict that the answer to the fourth question, $3,000, be changed to $6,824, and for judgment on the verdict as amended. Defendant moved for judgment notwithstanding the verdict, for the changing of certain questions, to set aside the verdict, and for new trial.

The court denied all motions except the one to set aside the verdict and for new trial, and ordered a new trial on the ground that the special verdict of the jury was inconsistent, perverse, and the result of compromise. Plaintiff appealed from the order.

For the appellant there was a brief by *Dillon & Tomkins* of Ashland, and oral argument by *A. Pearce Tomkins.*

For the respondents there was a brief by *J. L. Kelley* of Wausau and *Perry Niskern* of Berlin, and oral argument by *Mr. Kelley.*

KERWIN, J. It is established by the verdict of the jury and the evidence that on May 4, 1907, a judgment in favor of H. R. Laing against the plaintiff was docketed in the circuit court for Waushara county for $710.16, which judgment was afterwards docketed in Green Lake county June 3, 1907; that on July 6, 1908, execution was issued out of the circuit court for Waushara county directing the sheriff of Green Lake county to satisfy said judgment out of property in the latter county; and that L. A. Merrill, then sheriff of Green Lake county and predecessor in office of the defendant *Thrall,* levied upon several parcels of land in which plaintiff

had an interest and sold the same to said Laing for $820.24 September 19, 1908, and on said date issued a certificate of sale to him. The plaintiff lived at Ashland, and on the 13th day of September, 1909, went to Green Lake for the purpose of redeeming said real estate from the sale. She testified that she went to defendant *Thrall* and told him that she wanted to redeem the property so sold and asked him to figure out the exact amount necessary for her to pay in order to redeem, and said that she had come from Ashland for the express purpose of saving the property before the time expired to redeem; that the sheriff told her that he had orders not to deal with her, that she must go to other parties, naming H. R. Laing and C. S. Morris, and said he had been advised by his attorney over the phone to pay the money into court; that defendant *Thrall* went with plaintiff to the clerk of the court, Yahr, and told her to pay the money to Mr. Yahr; that she informed Yahr which pieces of land she wished to redeem and asked him to compute the correct amount, and Yahr figured the amount which he claimed was necessary to redeem as $805.80; that she then paid defendant *Thrall* $85, which he turned over to Yahr, clerk of the court, and she promised to send the balance, $720.80, as directed by *Thrall.* This amount she afterwards sent in the form of a draft, dated September 15, 1909, payable to Yahr, clerk of the court, in a letter to defendant *Thrall,* which was received by him September 16, 1909. This draft was returned by defendant *Thrall* to the plaintiff, after having been handed back to him by Yahr, in a letter dated September 21, 1909, and received by plaintiff September 22, 1909, the only explanation in *Thrall's* letter being, "It is no good to me."

The defendants claim that the plaintiff did not tell *Thrall* she wished to redeem any land from the sale, but that she stated she wanted to know the amount of the judgment.

The jury found in accordance with the plaintiff's contention that she informed the defendant *Thrall* she wished to

redeem the lands from sheriff's sale; that the defendant *Thrall* made Yahr, clerk of the court, his agent for receiving money from plaintiff in redemption of the lands; that the $85 was paid to Yahr; and that in September, 1909, the plaintiff's interest in the property which she wished to redeem was $3,000. It also appears that the amount computed by the clerk, acting for the sheriff, was simply the amount of the judgment and interest, which was something over $50 short of the correct amount necessary to redeem from the sale.

If the facts be as testified to by the plaintiff, we are convinced there was a valid redemption of the land in question. It is contended on the part of the respondents that because the full amount necessary to redeem was not paid or tendered there was no redemption; while on the part of the appellant it is contended that since the defendant sheriff through his agent, Yahr, undertook to compute the amount necessary to be paid in order to redeem, and plaintiff paid or tendered such amount, there was a redemption. In other words, that the sheriff was bound by the amount stated when he undertook to compute the amount necessary for plaintiff to redeem. Whether the sheriff was bound to furnish the plaintiff with a statement of the amount necessary to redeem we need not and do not decide, yet if he did so he was bound by the amount stated and relied upon by plaintiff, and the payment or tender of such amount constituted a redemption. *Hall v. Fisher,* 9 Barb. 17; *Id.* 1 Barb. Ch. 53.

But while we are of opinion that if the facts testified to by plaintiff are true there was a redemption, the question arises as to what the judgment in such case should be. Should the plaintiff have judgment for the value of the equity of redemption, or should there be, upon such facts, redemption of the property if redemption can now be had on payment to the purchaser of the proper amount? Our statute provides that upon payment made of the proper amount to redeem, the sale and certificate of sale shall be null and void. Sec. 3005, Stats. While the court below set aside the verdict on the

ground of inconsistency and compromise, it is obvious from the opinion of the learned trial judge in the record that he was of opinion that the plaintiff should not have judgment against the sheriff and bondsmen for the value of the equity of redemption and thus leave the matter unsettled between the sheriff and purchaser, but that the remedy should be in equity and all parties interested brought into court and their rights settled in this action.

It is true that the jury found by the fourth question that plaintiff's interest in the property was $3,000, while in fact the undisputed evidence showed it to be $6,824. The answer to the fourth question, we think, was wrong and unsupported by the evidence and might have been corrected by the court, but in all other respects we think the verdict was consistent and supported.

Point is made in the opinion of the trial judge that there was inconsistency between the answers to the second and third questions of the special verdict to the effect that, if Yahr was the agent of *Thrall,* the $85 was necessarily paid to *Thrall* and the jury found that it was paid to Yahr. But it seems obvious that the jury, in finding by the second question that *Thrall* made Yahr his agent for receiving the money from plaintiff in redemption of the lands from sheriff's sale, and by the third question that the $85 was paid to Yahr, meant that the manual delivery of the money was to Yahr, but to him as agent of *Thrall* and for *Thrall.*

We hold that the plaintiff cannot recover against the defendants sheriff and bondsmen unless she has lost the title to the land or a portion of it, and she has not lost it as against the purchaser if she in fact redeemed. Sec. 3005, Stats. While the facts testified to by the plaintiff would establish a redemption, still the verdict to that effect does not bind the purchaser, since he was not a party to the action, and he is entitled to his day in court on the question of redemption. If it be found on another trial, as established by the record here, that plaintiff told the defendant sheriff she wanted to

redeem from the sale, and he, through the clerk, gave her the amount and she paid or tendered it to him within the year, it was in fact a redemption though the sum was too small.

If the land was redeemed from the sale it still belongs to plaintiff as against the purchaser and all who purchased with notice. If parts of the land have been sold to persons who claim to be innocent purchasers, they should be brought into this action and their rights determined.

Whether under sec. 3005, Stats., any title can be acquired by any purchaser, however innocent, is not now decided and no opinion is intimated thereon. If title to any part of the land has been lost the plaintiff would have a claim against defendants for the damages resulting from such loss, provided it be established that a redemption was in fact made.

When the new parties are brought in, new pleadings should be required of all parties and the action transformed into an action by the plaintiff to quiet title, and for damages incidentally against the sheriff in case title to the land has been lost. This will be an action in equity, outside of the statutory action to quiet title, and will evidently fall under the fourth subdivision of sec. 4221, Stats., hence is not barred until expiration of ten years. *Post v. Campbell,* 110 Wis. 378, 85 N. W. 1032.

As the record now stands there is nothing to show but that plaintiff, upon payment of the proper amount, may have redemption of the premises, the sheriff's deed set aside, and the title quieted in her, and this, under the circumstances as shown by the record, would seem to be the most efficient and proper remedy. If it shall appear, when all parties interested or claiming to be interested are before the court and their rights determined, that there was redemption and that plaintiff cannot obtain complete relief by recovery of her property, she may have judgment for damages against the defendants.

There can be no doubt, as suggested by the trial judge in his opinion, but that the court below has ample power to

bring in the purchaser, Laing, and any and all other persons in possession or claiming any interest in the premises so that their claims may be adjusted and it be determined whether the sheriff's deed to Laing should be canceled and the cloud removed upon payment to Laing by plaintiff of the proper amount. Under our statutes there is ample power to proceed as indicated. Secs. 2603, 2610, and 2836*b*.

We hold that the order granting a new trial should be affirmed, that the court below order the purchaser at the sale, H. R. Laing, and each and every person in possession of the real estate in question, or claiming any interest therein, to be made parties to the action, and that the pleadings be so amended as to present all issues.

By the Court.—The order appealed from is affirmed, and the cause remanded for further proceedings in accordance with this opinion.

STATE EX REL. JOHNSON and others, Respondent, vs. COUNTY BOARDS OF SUPERVISORS OF LA CROSSE AND TREMPEALEAU COUNTIES, Appellants.

April 30—May 21, 1918.

Constitutional law: County government: Uniformity: Classification: Bridges over county boundaries: Maintenance.

Sec. 1325*i*, Stats. 1915, providing that public bridges *heretofore constructed* across waters forming county boundaries shall be operated, maintained, and repaired at the joint expense (apportioned as there stated) of the counties directly joined thereby, violates sec. 23, art. IV, Const., which requires a uniform system of town and county government—the classification made by said statute being based upon circumstances as they existed at the time of its enactment alone, and not permitting any subsequent additions to the class in question.

APPEAL from an order of the circuit court for Trempealeau county: JAMES WICKHAM, Judge. *Reversed.*

The appeal is from an order denying a motion to quash an alternative writ of *mandamus.*

The Black river is the boundary line of La Crosse and Trempealeau counties in this state and was crossed by a bridge from the town of Caledonia in Trempealeau county to the town of Holland in La Crosse county on what was known as the McGilvary highway. This highway connects, among other points, the county seats of the respective counties.

Resident taxpayers of the respective towns made demand in October, 1915, upon the defendant counties that such bridge, alleged to have been out of repair and unfit for service for a long time, should be repaired so that the same might become open to public travel and afford petitioners access to their respective lands bordering on the McGilvary road. No steps were taken by the counties pursuant to such notice, and thereafter a petition was filed in this court asking that a writ of *mandamus* should be issued under the original jurisdiction of this court to the respective counties requiring them to repair such bridge pursuant to sec. 1325*i*, Stats., being ch. 565, Laws 1915. This court certified the proceedings to the circuit court for Trempealeau county for hearing and determination. *State ex rel. Johnson v. County Boards*, 165 Wis. 164, 161 N. W. 356.

In the court below the defendant counties moved to quash the alternative writ of *mandamus,* which was based upon the said petition. From the order of the circuit court denying such motion to quash the defendant counties have appealed.

Elmer E. Barlow of Whitehall and *Otto M. Schlabach* of La Crosse, for the appellants.

For the relators there was a brief by *R. S. Cowie* of Whitehall and *Edward Lees* of La Crosse, and oral argument by *Mr. Cowie.*

ESCHWEILER, J. The court below in this matter in effect held that the defendant counties were obliged to repair and

put in fit condition for public travel this bridge crossing the Black river between the two counties and that they should proportionately pay the expenses thereof, basing his ruling upon the provisions of sec. 1325*i*, Stats. 1915, which was created by ch. 565 of the Laws of 1915, and which reads as follows:

"Section 1325*i*. All public bridges, and the necessary approaches and appurtenances thereto, heretofore constructed across any river, stream or other waters forming the boundary line between two or more counties in this state by any county or any municipality or municipalities or by any county and municipality or municipalities, shall be operated, maintained and repaired at the joint expense of the counties directly joined thereby, and the expense of operating, maintaining and repairing the same, and all approaches and appurtenances thereto, shall be apportioned to and borne by each such county in proportion to the taxable property therein, as shown by the last preceding equalization by the state tax commission. Any matters relating to the repair of any such bridge, including the necessity and character thereof, upon which the county boards of such counties or the committees thereof cannot agree, may be submitted by any such county board or committee to the state highway commission for determination and the determination by said commission shall be binding upon all the counties liable for the maintenance and repair of such bridge. If any county shall not provide for or pay its full share of such expense in any year the other county or counties may provide for and pay the same, and may, at any time after thirty days after demand in writing served upon the county treasurer of the county in default, recover of such county the moneys so paid out for it, with interest from the time of payment and costs of suit."

It is contended by the defendant counties that such statute must be held null and void because in contravention of sec. 23, art. IV, Const., which is as follows:

"The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."

That legislation concerning the building of bridges by towns or counties and legislation such as here in question must, in order to meet the constitutional requirements, comply with this section of our constitution, is not an open question in this state. *State ex rel. Merrimac v. Hazelwood,* 158 Wis. 405, 149 N. W 141.

The plain language of this statute, speaking as it does as of the time of its enactment in August, 1915, applies only to such bridges as were *heretofore,* that is in 1915, already constructed across streams which formed county boundaries. This language admits of no reasonable construction which would allow it to apply to any bridge that may be constructed after August, 1915, over just such a boundary stream. In determining whether a bridge across a stream dividing two counties is to come within the intendment of this section it would be necessary to ascertain the fact whether such bridge had been constructed before or after August, 1915. If the former it is within, if the latter without, the intention of the statute. The bridges in this state that could be affected by this statute are therefore as definitely prescribed as though listed by name, number, or location in the act itself.

The classification thus made, therefore, is based upon circumstances as they existed at the time of its enactment alone, and will not permit of additions to such class to be made from time to time. Uniformity of town and county government under this clause of the constitution requires that legislation affecting such a subject as we have here under consideration must not be confined to present conditions or subjects only, and must be elastic enough to include conditions and subjects that may come into existence after the enactment of the legislation. *State ex rel. Merrimac v. Hazelwood,* 158 Wis. 405, 149 N. W. 141; *Bingham v. Milwaukee Co.* 127 Wis. 344, 347, 106 N. W. 1071; *Battles v. Doll,* 113 Wis. 357, 361, 89 N. W. 187; *Wagner v. Milwaukee Co.* 112 Wis. 601,

608, 88 N. W. 577; *State ex rel. La Valle v. Sauk Co.* 62 Wis. 376, 22 N. W. 572.

The same subject of uniform classification according to constitutional provisions is treated of in a number of other cases reaching the same conclusion. *Burnham v. Milwaukee,* 98 Wis. 128, 135, 73 N. W. 1018; *Maercker v. Milwaukee,* 151 Wis. 324, 329, 139 N. W. 199; *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 220, 119 N. W. 309, 120 N. W. 756; *Bloomer v. Bloomer,* 128 Wis. 297, 307, 107 N. W. 974; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 54, 98 N. W. 954.

We are therefore forced to hold that this sec. 1325*i*, Stats. (ch. 565, Laws 1915), does violate the provisions of sec. 23, art. IV, Const., and is void and affords no basis for the relief for which the petitioners ask.

While there may be great practical difficulties in the way of petitioners obtaining relief from the unpleasant predicament in which they find themselves with reference to this bridge, as would appear from their petition, from the apparent disinclination of the respective towns involved to do the necessary work of reconstruction or repair in the manner provided for under secs. 1319, 1320, and 1321, Stats., yet we cannot permit such a consideration to outweigh our plain duty to declare that the courts must refuse to enforce compliance with statutes enacted in violation of constitutional provisions.

This determination of the one question renders it unnecessary to dispose of any of the other questions raised or suggested on this appeal.

By the Court.—The order of the circuit court is reversed, and the cause remanded with directions to quash the alternative writ of *mandamus* herein.

ZAWACKI, Appellant, vs. GOOD SAMARITAN HOSPITAL, Respondent.

April 30—May 21, 1918.

Hospitals: Physicians and surgeons: Negligence: Injury to patient: Questions for jury: Damages: New trial: Appeal: Questions raised: Milwaukee civil court.

1. Upon the evidence in this case the question whether any injury to plaintiff's health was proximately caused by negligence of the attendants in the defendant hospital, or whether the injuries complained of are attributable to ailments with which plaintiff had been afflicted a long time before she entered the hospital as a patient, is *held* to have been one for the jury.
2. An appeal from an order of the circuit court reversing a judgment of the Milwaukee civil court and granting a new trial in the circuit court does not bring before the supreme court for review a previous order of the circuit court denying a motion to dismiss the appeal from the civil court to the circuit court.
3. In an action against a physician and a hospital for injury to the health of a patient, where the jury found that plaintiff was injured by the treatment given her by each defendant and that negligence of each defendant was a proximate cause of the injury, and assessed her damages, but after verdict the trial court correctly held that the physician was not negligent, a new trial was necessary, it being manifest that a part of the damages awarded were for the injury which the jury found was produced by the physician's treatment.

APPEAL from an order of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

The appeal is from an order reversing a judgment of the civil court of Milwaukee county in favor of the plaintiff in the sum of $1,500, and granting a new trial in the circuit court.

The plaintiff brought action to recover damages from Dr. Albin A. Krygier and the defendant hospital for injuries to her health alleged to have been caused by negligence in care of her while she was a patient at the institution.

Her complaint alleges, in substance, that on and prior to

the 12th day of March, 1916, the plaintiff, a married woman in pregnant condition, consulted the defendant Albin A. Krygier as to a suitable hospital to go to for confinement; that Dr. Krygier advised going to the *Good Samaritan Hospital;* that the plaintiff was a patient at that institution for a number of days, during which time she was mistreated both by reason of the physician's failure to leave instruction as to a proper diet and to care for her and also by reason of neglect on the part of the hospital attendants to care for her and her child, causing permanent injury to the health of the plaintiff. More particularly the complaint alleges: That on arriving at the hospital the patient was, against her wishes, placed in a public ward; that later she was moved to a private room which was unheated; that insufficient bed clothes were provided by the hospital so that she became chilled; that the nurses allowed her on several occasions to remain for hours in cold, water-soaked bedding in spite of her requests that they change the bed clothes; that while irrigating her they left the windows of the room open, exposing her person to chill winds; that on the second day after the birth of her child she was improperly fed; that the nurses persisted in harassing and annoying her by refusing to bring her child to her; that the child was kept a great portion of the time in a bathroom which diseased persons were accustomed to use and where the pans of the hospital were emptied; that this resulted in a heavy cold to the patient, from which she has never recovered, and caused her great nervous suffering.

The answer of Dr. Krygier denied that at any time he was guilty of misfeasance or malfeasance or that he had any knowledge of any mistreatment on the part of the hospital such as plaintiff's complaint alleges. He further denied that either patient or her child received any infection or injuries while at the hospital.

The answer of the defendant *Good Samaritan Hospital* also denied all charges of negligence or malfeasance.

The case was tried before the court and a jury. A special verdict was returned in which the jury found that the plaintiff sustained injury in consequence of the treatment given her at the hospital; that the hospital was guilty of negligence in the course of its treatment; that this negligence was a proximate cause of the patient's injury; that the plaintiff sustained injury in consequence of the treatment given her by Dr. Krygier; that he was guilty of negligence, and that such negligence was a proximate cause of the plaintiff's injury; that no want of ordinary care on plaintiff's part was a proximate contribution to her injury; and assessed the plaintiff's damages in the sum of $1,500.

The plaintiff moved for judgment on the verdict. The defendant moved for a judgment for the *Good Samaritan Hospital* upon the merits, notwithstanding the verdict, and asking, in event that the court denied the motion, that answers to certain questions be changed by the court; that in event these motions be denied the special verdict be set aside and a new trial granted.

The court changed the jury's answer finding Dr. Krygier guilty of negligence and that this negligence was a proximate cause of plaintiff's injuries, and dismissed plaintiff's complaint as against Dr. Krygier, and denied the motions of the defendant *Good Samaritan Hospital.* Judgment was entered accordingly, Dr. Krygier recovering his costs from the plaintiff.

The defendant appealed to the circuit court for Milwaukee county. Motion by the plaintiff to dismiss the appeal was denied. Upon the motion of the defendant *Good Samaritan Hospital* to set aside the judgment of the civil court and award judgment to dismiss the complaint upon the record and the files, the circuit court entered an order reversing the judgment of the civil court on the ground of prejudicial error and granting a new trial in the circuit court. Appeal is taken from this order.

For the appellant there was a brief by *Raymond J. Cannon,* and oral argument by *Mr. Cannon* and *Mr. W. L. Gold,* both of Milwaukee.

For the respondent there was a brief by *Robert R. Freeman,* attorney, and *Henry J. Bendinger,* of counsel, both of Milwaukee, and oral argument by *Mr. Bendinger.*

SIEBECKER, J. The defendant *Good Samaritan Hospital,* upon the return made by the civil court on appeal to the circuit court, moved to vacate the judgment awarding plaintiff recovery of the damages found by the jury in the civil court and that judgment be directed upon the record dismissing plaintiff's complaint. It is claimed that the plaintiff is not entitled to recover in this case for the reason that any negligence on the part of the hospital agents and servants is not shown to be the proximate cause of the injuries complained of by the plaintiff. This claim is based on the contentions (1) that the evidence fails to show that the plaintiff is afflicted with tuberculosis; (2) that the evidence discloses that the injuries complained of are attributable to ailments with which the plaintiff had been afflicted a long time prior to the time she entered defendant's hospital. The evidence bearing on the question of plaintiff's being afflicted with tuberculosis is very meager and indefinite and may be different on a retrial of the case. We deem it proper that this phase of the controversy be left for determination upon the evidence as it may appear upon a retrial of this issue.

It is contended that it is without dispute that the plaintiff had a goiter before Dr. Krygier treated her prior to her entrance into the hospital, and that his evidence shows that this affliction is the exciting cause of plaintiff's alleged nervousness, and hence it necessarily was a mere conjecture of the jury to find that the nervousness complained of resulted from the treatment she received at the hospital.

We cannot say upon the evidence presented, as a matter of

law, that the goiter affliction is the exciting cause of the nervousness plaintiff claims resulted from the alleged mistreatment charged in the complaint, nor is the contention of the defendant, that there is no credible evidence in the case tending to show that the alleged negligence of the hospital attendants is the proximate cause of any injury to plaintiff's health, sustained by the record. This was a proper inquiry for the jury to determine, and the trial court's ruling on this point must stand. The claim that the damages are excessive cannot properly be determined upon this appeal in view of the fact that a new trial of the case must be had.

The plaintiff insists that the circuit court erred in denying her motion to dismiss defendant's appeal of the case from civil court to the circuit court. It appears that judgment was entered in the civil court March 12, 1917, and that the defendant on March 16th served the required notice, affidavit, and undertaking for an appeal from this judgment to the circuit court, and filed the same in the civil court on March 19th, and that the return of the civil court pursuant to such appeal proceeding was made May 18th, showing that the clerk's fees were paid on that day. On May 25th the circuit court, upon plaintiff's application, made an order requiring the defendant to show cause before the court on June 2d why the appeal to the circuit court should not be dismissed for failure to pay the clerk's fees in the civil court within twenty days after service of the notice of appeal of the case to the circuit court as required by the provisions of ch. 320, Laws 1913.

This motion was heard in the circuit court upon affidavits and an order was made July 19, 1917, denying the motion to dismiss the appeal. On October 15, 1917, the circuit court entered an order upon defendant's motion reversing the judgment of the civil court awarding plaintiff recovery of damages and costs and directing that the action should be tried before a jury as if originally brought in the circuit court, upon the ground that the defendant had not had a fair trial in the civil court and that substantial justice cannot be done

and the rights of the parties cannot otherwise be preserved or protected. The plaintiff took this appeal from the order reversing the civil court's judgment and granting a new trial of the action in the circuit court.

This appeal is necessarily restricted to a review of this order and cannot embrace any other order by the circuit court in a separate proceeding, such as the motion for dismissal of the appeal above referred to. Nor can this court, upon the return of the civil court record, entertain the suggestion that the circuit court thereby acquired no jurisdiction of the case, since there was a separate and independent proceeding in circuit court to have the appeal from the civil court dismissed, which is supplementary to the return of the civil court on the question involved in such motion.

It is considered that the order of the circuit court refusing to dismiss the defendant's appeal from the judgment of the civil court is not before this court upon the appeal from the order of the circuit court reversing such judgment and granting a new trial in the action.

It is further contended by the plaintiff that the circuit court erred in granting a new trial, since the complaint against Dr. Krygier was dismissed for the reason that the evidence shows he was not guilty of any negligence contributing to the injuries plaintiff complains of. By the fourth question of the special verdict the jury found that Dr. Krygier's treatment of plaintiff was injurious and that such treatment proximately contributed to cause the injury.

The civil court after verdict correctly held that the doctor was not negligent in his treatment. It is manifest that the jury awarded her some damages for the injury they found the doctor's treatment produced. The circuit court held that this state of the case required that a new trial be granted in order that substantial justice be done and the rights of the parties be preserved and protected. We are of the opinion that this ruling was just and proper.

By the Court.—The order appealed from is affirmed.

LEHMAN, Appellant, vs. WEINER and others, Respondents.

April 30—May 21, 1918.

Circuit courts: Jurisdiction: Conversion of assets of estate being probated: Adequate remedy in county court.

1. The circuit court will not entertain an action by legatees against the executors and others for an alleged conversion of assets belonging to an estate which is being administered in the county court, the remedy in the latter court being adequate.
2. If in such a case the proceedings in the county court have terminated and the executors have been discharged, the appointment of an administrator *de bonis non* may be procured and he may proceed to collect the unadministered assets.

APPEAL from an order of the circuit court for Milwaukee county: CHESTER A. FOWLER, Judge. *Affirmed.*

Action for damages resulting from an alleged conspiracy and conversion of property belonging to the estate of Sarah A. Auspitz, deceased. The complaint alleges in substance that on the 11th day of May, 1908, Sarah A. Auspitz died testate at the city of Milwaukee, leaving therein an estate consisting of various items of personal property; that plaintiff and one Fanny Anton were legatees named in the will; that the latter was the residuary legatee and had for a valuable consideration sold her interest in the estate to plaintiff. It also alleges that the defendants *Michael Weiner* and *Hugo Weiner* were by the county court of Milwaukee county, on July 29, 1908, appointed executors of the will of said Sarah A. Auspitz, and that they qualified as such and entered upon the discharge of their duties.

The complaint then in four separate causes of action charges that either all the defendants jointly, or some of them, conspired to defraud plaintiff by converting certain specified personal property belonging to the estate of Sarah A. Auspitz to their own use and by filing a fraudulent inventory showing the estate to be less than it actually was. Damages

in the sum of $8,622.50 are asked, partly against all the defendants and partly against only some of them. At the opening of the trial all the defendants entered a general demurrer *ore tenus* to the complaint. The court sustained the demurrer, and plaintiff appealed.

F. J. Walthers of Milwaukee, for the appellant.

B. F. Saltzstein of Milwaukee, for the respondents *Michael Weiner, Hugo Weiner,* and *Nathan Glicksman.*

VINJE, J. Since the appeal presents the single question whether the circuit court will entertain an action for damages for converting assets belonging to an estate that is being probated in the county court, no further detailed statement of the allegations of the complaint than that given is deemed necessary. The court properly sustained the demurrer. There is no allegation that the estate is solvent. If it is not, plaintiff is not injured by the alleged conversion. But, assuming it to be solvent, the title to the property alleged to be converted passed to the executors, since it was all personal property, and they primarily should marshal the assets of the estate. However, conceding they would not do so in this case because of the facts alleged in the complaint, still the demurrer was properly sustained because the plaintiff has an adequate remedy in the county court. He can there compel the executors to file a correct inventory, to render a just and true final account, and to disclose all property coming into their hands, and if any third party is suspected of having or concealing any property belonging to the estate he may be cited to appear before the county court and make a full disclosure of the facts. Sec. 3825, Stats. 1917. It therefore appears that plaintiff has an adequate remedy in the county court to right all the wrongs complained of. In such cases the circuit court will not assume jurisdiction, but will leave the parties to the county court remedies. *Wisdom v. Wisdom,* 155 Wis. 434, 145 N. W. 126, and cases cited.

This subject was so fully treated in the *Wisdom Case* and the cases there referred to that no further discussion or restatement of the principles involved is deemed necessary. If the proceedings in the county court have terminated and the executors have been discharged, application therein for the appointment of an administrator *de bonis non* under sec. 3813*a*, Stats. 1917, can be made, and such administrator can proceed to collect the unadministered assets.

By the Court.—Order affirmed.

ZIMMER, Respondent, vs. SCHMITT, Appellant.

April 30—May 21, 1918.

Negligence: Trench dug in street: Failure to refill properly: Accident to automobile: Contributory negligence: Questions for jury.

1. Where a plumber after digging a trench in a street filled it in the ordinary and usual way but not in the manner or in accordance with the specifications prescribed in his permit to do the work and in the city ordinances, and by reason of his failure to comply with such specifications the street was left in a defective and dangerous condition, he was guilty of negligence rendering him liable for injuries caused by such defect.
2. One who, after such trench had been filled, approached the place in an electric automobile at a speed of twelve miles an hour and, although he saw the earth in the street, did not slacken his speed, was not as a matter of law guilty of negligence contributing to an injury sustained when a wheel of his car fell into the trench, there being nothing to indicate to him as he approached that the place was soft or unsafe for travel, and he having the right to assume that the trench had been filled in the manner prescribed by law and therefore was reasonably safe and not in a defective condition. *Lauson v. Fond du Lac*, 141 Wis. 57, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action for damages. Plaintiff is an automobile owner living in the city of Milwaukee. Sometime during the early part of January the defendant, a plumber, under permit issued by the public authorities, dug a trench from the north line of Knapp street extending south six feet, the trench being two feet wide and eight feet deep. After making a sewer connection the defendant filled the trench, using water and clay which had been removed from the excavation. The permit provided that the defendant should do the work promptly, and upon completion of the work "at once restore the said street to as good condition as it was at the time said opening was made;" that in refilling the trench the earth must be placed therein in layers of not more than six inches in depth, and each layer must be thoroughly tamped and rammed to prevent after-settlement; that "no frozen materials will be permitted to be replaced, nor will ashes be allowed to be used for back-filling;" and that in the performance of the work the licensee shall "comply with the general ordinances of the city of Milwaukee." In filling the trench the defendant put in a layer of ground, then turned running water into the trench, and then tamped it, put in more clay and used more water until the trench was filled to the top. On account of the winter weather the trench was not filled permanently, and as the weather moderated the filling in the trench would sink, so that from time to time refilling and leveling became necessary.

On March 18, 1915, the plaintiff was driving east on Knapp street in an electric automobile, and as he passed over the place in question the wheel of the auto fell into the trench and the car swerved to the left and skidded, breaking a wheel. The plaintiff testified that he saw the earth in the street as he approached the point in question and that he did not slacken nor attempt to slacken the speed of the car.

Plaintiff brought suit in the civil court of Milwaukee county against the defendant and the city of Milwaukee. A

jury was waived and, omitting formal matters, the court found that the excavation was made at the time and place claimed, under a permit granted by the city of Milwaukee for the purpose of making a trench and sewer connection; "that on account of the weather conditions it was not permanently refilled and replaced, but that it was temporarily refilled and the surface replaced from time to time as weather conditions and public travel permitted and demanded; that said street was out of repair by virtue of the condition of said ditch at the time of the accident; that the defendant *Edwin O. Schmitt* was not guilty of negligence;" that the city of Milwaukee had no notice of the defective condition of the street; that plaintiff's automobile was damaged as claimed; that the damage to said automobile was not occasioned by the negligence or carelessness of either of the defendants, and that plaintiff was not guilty of contributory negligence. Judgment was entered accordingly, and plaintiff appealed to the circuit court. No finding having been made by the civil court as to the amount of damages, it was stipulated that the damage sustained by the plaintiff was $300. On the hearing of the appeal in the circuit court the judgment of the civil court was reversed and plaintiff had judgment against the defendant for $300, from which judgment defendant appeals.

For the appellant the cause was submitted on the brief of *Henry J. Killilea* and *George Luebke* of Milwaukee.

For the respondent there was a brief by *Lines, Spooner & Quarles,* and oral argument by *Leo Mann,* all of Milwaukee.

ROSENBERRY, J. While the circuit court assigns no reason for reversing the judgment of the civil court, the reversal must have been based upon the fact that the testimony established that the defendant *Schmitt* was negligent in the manner in which he filled the trench. The circuit court

dismissed the complaint as to the city of Milwaukee, and there is no appeal from that part of the judgment.

We think the circuit court was clearly right in holding that the evidence established the negligence of the defendant *Schmitt*. It is claimed that because the defendant *Schmitt* filled the trench in the ordinary and usual way he cannot be charged with negligence. The permit itself specifies in express terms how the trench shall be refilled; that is, it shall be done in accordance with the conditions set out in the permit and the specifications prescribed by the public authorities. The specifications provide that in back-filling for trenches made in macadam pavements, after the trench is filled within three feet from the top in the manner prescribed, the next eighteen inches must be filled with gravel or sand thoroughly tamped in layers not exceeding six inches in depth. The next eighteen inches must be composed of crushed stone thoroughly tamped in layers not exceeding six inches in thickness, and new material only shall be used in the replacing of the macadam pavement proper.

It clearly appears that there was no effort made by the defendant to comply with these provisions. The accident was caused by reason of the fact that these requirements were not complied with, and instead of being filled with sand and crushed stone the trench was filled with soft clay, and as a consequence the wheel of plaintiff's automobile dropped into the depression and caused the damage complained of. The trial court found that "the said street was out of repair by virtue of the condition of said ditch at the time of the accident." We think the evidence clearly established the fact that the highway at the point in question was defective by reason of the defendant's negligence and conduct in failing to fill the trench as described by the terms of his permit.

It is also claimed that as a matter of law the plaintiff is guilty of negligence on the undisputed evidence. This

claim arises from the fact that plaintiff testified that he saw the earth in the street; that he did not slacken the speed of his car; and that at the time he struck the place in question he was driving at the rate of twelve miles an hour.

We have examined the evidence, and it cannot be said as a matter of law that plaintiff was guilty of negligence which contributed to the injury. The defective character of the street was due mainly to the filling which defendant had placed in the trench, contrary to the terms of his permit. It does not appear that plaintiff knew of the character of the filling or could have known it by such observation as he was able to make from his automobile. The danger not being open and obvious or apparent, under the circumstances of this case the plaintiff had a right to assume that the trench had been filled in the manner prescribed by law and therefore was reasonably safe and not in a defective condition. The facts in this case distinguish it from *Lauson v. Fond du Lac,* 141 Wis. 57, 123 N. W. 629. In that case a culvert was being replaced, leaving an opening in the highway about eight feet in width and nine feet in depth. Barriers were erected on either side of the opening, consisting of a single sixteen-foot fence board extending across the highway and nailed to posts, and the plaintiff drove through the barriers into the opening; the danger was open, obvious, and apparent. Here the defect consisted of a comparatively narrow break in the surface of the street in which there appeared to be earth, and there was nothing to indicate to the approaching driver that it was soft or that the place was unsafe for ordinary public travel.

By the Court.—Judgment affirmed.

WOODARD, Appellant, vs. CITIZENS SAVINGS & TRUST COMPANY and others, Respondents.

May 1—May 21, 1918.

Trust companies: Fraudulent investment of client's money: Cause of action, in whom vested after owner's death: Testamentary trustee.

1. When a trust company to which money was intrusted for investment fraudulently invested it in worthless or depreciated securities, a cause of action at once arose in favor of the owner for damages on account of the resulting loss to him.
2. Upon the death of such owner said cause of action vested in his estate and passed to his personal representatives, to be prosecuted for the benefit of the general estate.
3. The assignment by the county court, upon settlement of the estate, of the worthless or depreciated securities themselves to a testamentary trustee as part of a trust fund to be held by him, did not invest him with title to said cause of action.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a general demurrer to the complaint. The action is brought in equity by a testamentary trustee against an insolvent trust company, the state commissioner of banking who is in charge of its affairs, and the state treasurer, seeking to recover $6,400 from the trust company and to secure the payment of the judgment out of the securities deposited by the trust company with the state treasurer pursuant to law (Laws 1909, ch. 186) as security for the faithful execution of trusts. The complaint is long and somewhat involved, but as we understand it alleges in substance the corporate character of the trust company and its existence in active business at Milwaukee for many years prior to and up to the 2d day of October, 1913, on which date the defendant banking commissioner closed its doors and took charge of its affairs for the purpose of liquidation; that one Henry M. Ackley at various times be-

tween February, 1905, and April, 1910, turned over to said trust company certain sums of money aggregating $10,100 under the agreement, based upon a consideration, that the trust company would carefully loan and invest the same for him in small amounts and on first-mortgage security; that upon receipt of each of said sums so turned over the trust company fraudulently converted the same into certain named securities, some of which are alleged to have been wholly worthless and some worth only a percentage of their face, and all aggregating in value the sum of $3,700; that Ackley died testate in December, 1912, and that his will was duly probated in February, 1913, by the terms of which he bequeathed to his widow for life the income from the sum of $20,000, which sum was made a trust fund to be invested for her benefit during her life and thereafter to be distributed according to the terms of the will; that the plaintiff is the duly qualified and acting trustee of said trust, having succeeded one Edwards, who was appointed October 11, 1913; that upon the settlement of Ackley's estate said trust fund was by the county court "duly set apart and was composed and made up to that extent of the notes, securities, and obligations" taken by the trust company as hereinbefore stated, "and duly turned over to and received by the plaintiff as trustee aforesaid to carry out said trust;" that the plaintiff in February, 1914, filed a claim with the commissioner of banking for the matters and amounts set forth in the complaint, but that the same was wholly rejected, and that six months has not elapsed since such rejection; that the said trust company actually deposited with the state treasurer $100,000 in approved securities as required by law, and that the same are now in the hands of said treasurer.

The cause was submitted for the appellant on the brief of *Tullar & Tullar* of Waukesha, and for the respondents on that of *Flanders & Fawsett,* attorneys, and *Charles E. Monroe,* of counsel, all of Milwaukee.

WINSLOW, C. J. The propositions which are decided in this case and which render necessary an affirmance of the order appealed from are as follows:

1. When the trust company invested Mr. Ackley's money in worthless or depreciated securities, a cause of action at once arose in favor of Ackley against the trust company for the loss occasioned to him by reason of such investment.

2. Upon Ackley's death such cause of action vested in his estate and passed to his personal representative, namely the executor, to be prosecuted for the benefit of the general estate.

3. The assignment of the worthless or depreciated securities themselves to the plaintiff as part of the trust fund to be held by him in trust for the benefit of the widow did not invest the trustee with title to the claim or claims for damages in favor of the estate resulting from the investment of Ackley's funds in worthless securities.

4. There is no allegation in the complaint showing that the trustee ever acquired title in any way to such claims for damages, hence no cause of action is stated in his favor.

By the Court.—Order affirmed.

HAYDEN, Respondent, vs. WOMEN'S CATHOLIC ORDER OF FORESTERS, Appellant.

May 2—May 21, 1918.

Life insurance: Benefit societies: Vested rights of beneficiary: Endowment certificate: Assignment to creditor: Validity: Witnesses: Competency: Transactions with person since deceased.

1. The beneficiary named in a certificate issued to a member of a fraternal benefit society does not acquire absolute and indefeasible rights until the death of the member.
2. Where a member of a benefit society, holding an endowment certificate upon which her son had been paying the dues and assessments, made an oral agreement with him by which she

was to make him her beneficiary under such certificate and he was to continue to make such payments and was also to give her a home and care for her during her remaining years, and pursuant thereto she changed her certificate for a new one in which the son was named as beneficiary, such attempted assignment or pledge was void under provisions in the constitution of the society, made a part of its contract with the member, that "an endowment certificate cannot be made payable to a creditor, nor held wholly or in part, nor assigned, to secure any debt which may be owing by the member," and that "any assignment of an endowment certificate . . . shall be void;" and the son acquired no rights or interest in or to the certificate and its proceeds.

[3. Whether, after the mother's death, the son was a competent witness to testify to the oral agreement with her, under sec. 4069, Stats., is not decided.]

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

The appeal is from a judgment in favor of the plaintiff and against the defendant for the sum of $1,247.82, damages and costs.

The action was brought on a certificate of insurance issued by the defendant, a mutual benefit association. The action was tried before a jury. Both parties moved for a directed verdict, so the issues were tried by the court.

The complaint of the plaintiff alleges, in substance, that the plaintiff's mother, Alice Gillard, was admitted to membership in the defendant organization on June 11, 1900; that the defendant at that time issued to Alice Gillard its benefit certificate for $1,000, payable to John Gillard, husband of the insured; that the defendant's constitution provided that a member may at any time, upon compliance with the laws of the order, surrender her endowment certificate and that a new certificate shall be issued payable to such beneficiary as the member may direct; that in 1910 Alice Gillard offered to transfer the insurance to the plaintiff to compensate him for money loaned and advanced to her or that might thereafter be advanced to her or for her benefit,

upon condition that he pay the dues and assessments thereon, and that this offer was accepted by the plaintiff; that pursuant to this understanding Alice Gillard complied with the laws of the defendant and changed her certificate, designating plaintiff as the beneficiary; that this certificate was delivered by Alice Gillard to plaintiff, who has since been and now is the owner and possessor thereof; that plaintiff paid all dues and assessments upon said certificate up to October, 1914, and thereafter made tender thereof to the defendant, which tender was refused; that Alice Gillard died April 11, 1915; that no change in the beneficiary was made subsequent to the naming of the plaintiff; and that there is due on the certificate the sum of $1,000.

The answer of the defendant denies the agreement as alleged between the plaintiff and Alice Gillard and that the plaintiff was named beneficiary pursuant to any such agreement; denies that plaintiff paid dues and assessments; denies that there was no change of beneficiary subsequent to plaintiff's being named, and that there is any sum whatsoever due plaintiff from the defendant upon the alleged certificate. The defendant further alleges:

(1) That the defendant's constitution provided that an endowment certificate may be made payable to nieces and nephews, and that in case a certificate is lost or beyond a member's control the member may, in writing, surrender all claims thereto and direct the issuance of a new certificate; that the issuing of such new certificate renders null and void any previous certificate issued; that on September 29, 1914, Alice Gillard made affidavit that the certificate wherein plaintiff was named beneficiary was in the hands of one who refused to surrender its possession, and that she surrendered all claim thereto and requested that a new certificate be issued payable to her niece, Mary Keenan; that, Alice Gillard having complied with the defendant's laws, the defendant, in accordance with its constitution, canceled the certificate

wherein plaintiff was named beneficiary, whereby the same became null and void, and on said date issued to Alice Gillard a new certificate wherein Mary Keenan was named beneficiary.

(2) That Mary Keenan commenced an action against the defendant in Cook county circuit court, based on the certificate wherein she was named beneficiary, and that final judgment was rendered thereon against the defendant in favor of Mary Keenan for the sum of $1,000 and costs.

(3) That the constitution of the defendant order provided that an endowment certificate cannot be made payable to a creditor in whole or in part, nor assigned to secure any debt which may be owing by the member, and that any such assignment of a certificate is void.

Both parties having made motions for a directed verdict, upon the conclusion of receiving evidence in the case the court found substantially all the material allegations of the complaint to be true. Upon the issue whether Alice Gillard had assigned an interest in the certificate to plaintiff, the court found that she had entered into an agreement with her son by which he was to give her a home and care for her during her remaining years and by which he was to pay dues and assessments on the certificate made out to him; that plaintiff continued to make payments on the certificate until such payments were refused; that both plaintiff and his mother notified the order of the agreement between them; that the defendant failed to make any inquiry as to the basis of the plaintiff's claim to a vested interest in the certificate; that the certificate was changed as stated in the answer; that there was nothing in the constitution of the order to prevent a beneficiary from obtaining a vested interest in a certificate.

As conclusions of law the court held that the plaintiff had a vested interest in the certificate in which he was named as beneficiary, which could not be divested; that the issuance of the Keenan certificate did not defeat the vested interest of

plaintiff in the certificate in which he was designated as beneficiary.

Judgment was entered awarding plaintiff recovery upon the certificate he had in his possession wherein he was designated as beneficiary. This is an appeal from such judgment.

For the appellant there was a brief by *Hennessey, Hennessey & O'Boyle,* attorneys, and *Vincent D. Hennessey,* of counsel, all of Milwaukee, and oral argument by *Vincent D. Hennessey.*

For the respondent there was a brief by *O'Connor & Burns,* and oral argument by *George A. Burns* and *Thomas F. Hayden,* all of Milwaukee.

SIEBECKER, J. Counsel for the respective parties have submitted exhaustive briefs upon the various questions presented by the different issues raised by the pleadings and the evidence. Upon the view of this court that the rights of the parties are concluded by the terms and conditions of the certificate issued to Mrs. Gillard and the provisions of the constitution of the order, all other questions are rendered immaterial to the decision and need not be considered and discussed.

The plaintiff avers that he had a vested interest in the certificate he held and bases this right upon the twofold basis (1) that he had been designated the beneficiary for a valuable consideration in this certificate, and (2) that he had acquired an interest in this certificate and the proceeds thereof by an assignment of an interest to him under a parol agreement with his mother for a valuable consideration, and that the defendant had notice thereof before it issued a subsequent certificate wherein Mary Keenan was designated as the beneficiary.

The decisions of this court establish that the beneficiary named in a certificate of a benefit society organized like the

defendant does not acquire absolute and indefeasible rights until the death of the member to whom the certificate is issued. *Malancy v. Malancy,* 165 Wis. 642, 163 N. W. 186, and cases of this court there cited to this proposition. The provisions of sub. 5, sec. 1957, Stats., harmonize with this principle. It is also well established that the provisions of the constitution of a benefit society, made a part of its contract with a member, are binding upon the members. *Thomas v. Covert,* 126 Wis. 593, 105 N. W. 922; *Ormond v. McKinley,* 163 Wis. 205, 157 N. W. 786; *Malancy v. Malancy, supra.*

The certificate in question provides that it is issued upon condition that the insured complies with the laws, rules, and regulations of the order. The constitution of the order provides, among its laws, rules, and regulations:

"No will shall be permitted to control the endowment or distribution of, or rights of any person to, any endowment payable by this order." Art. XV, Endowment Certificates, sec. 2, par. 3. . . . "An endowment certificate cannot be made payable to a creditor, nor held wholly or in part, nor assigned, to secure any debt which may be owing by the member. Any assignment of an endowment certificate by a member or a beneficiary shall be void." Sec. 2, par. 4.

The provisions specifically prohibit and make void any assignment, transfer, or pledge of the certificate or the proceeds thereof. It appears that the plaintiff, under the alleged arrangement with his mother, was her creditor to the extent of the moneys advanced or paid to her or paid for her as assessments and dues assessed against her as a member of the order. It is obvious that any attempted assignment or pledge thereof by Mrs. Gillard is void under the terms and provisions of the order's rules and regulations, and that plaintiff acquired no rights or interest in or to the certificate and its proceeds, and that he has no cause of action against the defendant.

The foregoing determination is on the assumption that the

plaintiff's claims would be sustained by the evidence of the alleged parol agreement between himself and his mother for an assignment and transfer to him of an interest in the certificate. We assume this state of facts without deciding the question whether or not the plaintiff is a competent witness to testify to such parol agreement which he claims to have made with his mother, now deceased, under the provisions of sec. 4069, Stats.

Upon the foregoing consideration it follows that the trial court erred in holding that the plaintiff had a right to recover on the certificate in question.

By the Court.—The judgment appealed from is reversed, and the case is remanded with direction to the trial court to dismiss plaintiff's complaint.

PROHL, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

May 2—May 21, 1918.

Railroads: Injury to person walking on sidewalk near track: Contributory negligence: Questions for jury.

While walking, on a cold winter day, with his head wrapped in heavy clothing, upon the sidewalk in a public street, the curb being twenty-four inches from the nearest rail of defendant's track, plaintiff was struck from behind and injured by the tank of an engine which was drawing a train on said track at a speed of ten or twelve miles an hour. There was evidence that the engine bell was not rung or the whistle blown; also that shortly before the accident plaintiff had looked to see whether a train was approaching and that none was coming and he heard none. *Held*, that he was not guilty of contributory negligence as a matter of law either in walking as he did or in failing to see or hear the approaching train.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Personal injury. The plaintiff had worked for a number of years at different plants located on Commerce street in the city of Milwaukee, and at the time of the accident in question was working for Conrad Brothers Tannery on said street. He reported for work in the morning, was advised that his services were not needed on that day, and started to return home, walking southerly on Commerce street. The defendant's right of way and track are located on the westerly side of Commerce street, and adjacent to the defendant's right of way there is a paved sidewalk varying in width from eight feet to sixteen feet. At the place where the accident happened the sidewalk is ten feet five inches wide. The distance between the curb of the sidewalk and the nearest rail of defendant's track is twenty-four inches. Plaintiff knew that trains might be expected at any time to pass along on the track adjacent to the sidewalk. While walking on the sidewalk near the curbing he was struck on the right shoulder by the tank of an engine which was drawing a train of cars and proceeding in a southerly direction. This action was brought in civil court to recover damages for injuries sustained.

The jury found as follows: (1) That the engineer failed to exercise ordinary care in operating the locomotive at the time of and immediately before striking the plaintiff; (2) that the want of such ordinary care was the proximate cause of plaintiff's injury; (3) that plaintiff was not guilty of a want of ordinary care in walking within six and one-half inches of the overhang of defendant's engine, knowing that the engine was approaching; (5) that plaintiff, in the exercise of ordinary care, ought not to have either seen or heard the engine in time to avoid coming in contact with it; and assessed plaintiff's damages at the sum of $630. After verdict there were motions to change the answers to questions 3 and 5 and for judgment for the defendant on the verdict as modified and a motion for judgment for plaintiff on the ver-

dict. The trial court changed the answer to question number 3 from No to Yes, and upon the verdict as so modified judgment was entered dismissing the complaint.

Plaintiff appealed to the circuit court for Milwaukee county. Upon hearing the circuit court reversed the judgment of the civil court, reinstated the jury's answer to question 3, and gave judgment for the plaintiff upon the special verdict and denied defendant's motions. From the judgment of the circuit court the defendant appeals.

Rodger M. Trump of Milwaukee, for the appellant.

For the respondent there was a brief by *Raymond J. Cannon,* attorney, and *W. L. Gold,* of counsel, both of Milwaukee, and oral argument by *Mr. Cannon.*

ROSENBERRY, J. It is claimed that the circuit court erred (1) in restoring the jury's answer to question 3, and in failing to change the answer to question 5 so as to show that plaintiff was guilty of contributory negligence. The accident occurred on the 26th day of January, 1917, at a time when the thermometer registered ten degrees below zero, in consequence of which the plaintiff had his head wrapped in heavy clothing. There is ample evidence in the record to sustain the finding that the engineer did not blow the whistle and that the bell was not rung. The train was moving at a speed of ten to twelve miles an hour and was composed of an engine and eight cars, five loaded with coal and three empties. It is claimed by the defendant that plaintiff's witnesses did not hear the blowing of the whistle or the ringing of the bell because of the noise which the engine was making. On the part of the plaintiff it is claimed that shortly before the accident he had looked to see whether a train was approaching and that none was coming and that he heard none.

If the plaintiff had been walking upon the right of way of the defendant company and had been injured under the circumstances shown by the evidence in this case it might be

fairly said that he was guilty of contributory negligence as a matter of law. In this case, however, the plaintiff was not walking upon the right of way of the defendant company, but upon a public street in a place prepared for pedestrians; and while this did not absolve him from the duty of exercising ordinary care for his own safety, we think under all the facts and circumstances shown by the evidence in this case it was a question for the jury whether or not he was in the exercise of ordinary care in walking as he did. Both the civil court and the circuit court are of opinion that he was not guilty of contributory negligence as a matter of law in failing to see and hear the approaching train, and we cannot say that they are clearly wrong.

By the Court.—Judgment affirmed.

KUNZ, Appellant, vs. WHITNEY and another, Respondents.

May 2—May 21, 1918.

Vendor and purchaser of land: Strict foreclosure: Election by vendor as to unpaid note for part of purchase price: Right to recover on note.

1. By the terms of a land contract a note given by the purchasers was to apply, when paid, as a part of the purchase price. In an action for strict foreclosure of the contract the vendor elected to treat the amount of said note as a part of the amount to be paid by the purchasers as a condition of relief from their default. Upon their failure to pay, he obtained possession of the land and the foreclosure judgment was made absolute. *Held*, that he could not thereafter enforce payment of the note.
2. Neither the fact that a different rate of interest was to be paid on said note than on other payments provided for in the land contract, nor the fact that the rental value of the premises while occupied by the purchasers was in excess of all payments made by them, gives the vendor any right to recover on the note.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

The appeal is from a judgment reversing a judgment of the civil court of Milwaukee county and dismissing the plaintiff's complaint.

The plaintiff and appellant, owner of certain real estate in the city of Milwaukee, made a written contract of sale with defendants for such property at the purchase price of $8,000, $100 paid at the time of the signing of the contract, October 12, 1914; $50 or more per month to apply on the principal; interest at five per cent. on all deferred payments, payable semi-annually and to be adjusted annually; the defendants then giving to the plaintiff a note secured by a trust deed on property located in Duluth, Minnesota, for $1,000 at six per cent., payable on or before June 1, 1915; the contract further providing that when said note is paid it shall apply as part of the purchase price, and that when the defendants had paid down $5,000 they were to receive a warranty deed and to give a mortgage for the balance of the purchase price.

The contract further contained customary provisions as to the defendants insuring the property and paying taxes thereon, and that, in case the defendants should fail or neglect to make any payment provided for in the contract at the time when the same became due and payable, the whole of the principal sum then unpaid, together with interest, shall be deemed to have become due and payable.

It also provided that if the defendants failed to make any of the payments of purchase money or interest at the times or in the manner specified, or should violate any of the provisions of the contract, the contract might then, at the option of the plaintiff, thenceforth be utterly void and all payments thereon forfeited, subject only to be revived and renewed by the act of the plaintiff or the mutual agreement of the parties.

Plaintiff commenced suit in the civil court of Milwaukee county to recover upon the $1,000 note above specified, together with interest thereon from October 12, 1914.

Defendants in answer pleaded, and evidence was received

establishing as facts, that prior to the commencement of this action upon the $1,000 note the plaintiff commenced an action against the same defendants in the circuit court for Milwaukee county for a strict foreclosure of the land contract, alleging therein, among other things, the execution and delivery of the identical note herein involved; that a judgment of strict foreclosure upon appropriate findings in such action was made in March, 1916, in which the findings of fact recited that the defendants had failed to pay the $1,000 evidenced by said note, and that, including such $1,000, the defendants were at such time in arrears on said land contract in the sum of $2,105.40; that by such judgment of foreclosure it was provided that the defendants should have sixty days from service of notice of entry of such judgment to pay such sum of $2,105.40, together with interest and costs, and that unless such payment was made the defendants should be foreclosed of all and any right or claim in and to such real property and that possession thereof should be given to the plaintiff; that such notice of entry of judgment was served upon defendants, that they failed to make redemption thereof, that a writ of assistance was obtained by the plaintiff and thereupon he obtained possession of the real property, and then, upon his motion, said judgment of strict foreclosure was made absolute.

The plaintiff offered evidence to the effect that the rental value of the premises during the time they were in possession of the defendants under such land contract was about $800 in excess of all payments made by them during that period; that the property was sold for $200 less than the defendants were to pay for it; and that there were insurance, taxes, and repairs necessarily paid by plaintiff on account of such occupancy by the defendants. This on plaintiff's theory that such showed that defendants had received value for such note.

Judgment was rendered in civil court in favor of plaintiff for the amount of the $1,000 note, together with interest.

Upon appeal to the circuit court the judgment was reversed and the action dismissed upon the merits. From such judgment the plaintiff appealed to this court.

Max J. Leutermann of Milwaukee, attorney, and *C. F. Lamb* of Madison, of counsel, for the appellant.

For the respondents there was a brief by *Aarons & Niven* of Milwaukee, and oral argument by *John M. Niven.*

ESCHWEILER, J. Appellant contends that the terms of the land contract were such that, even after a retaking of possession of the land pursuant to a foreclosure of the land contract in which the identical $1,000 evidenced by the note herein in suit was considered as a part of the amount required to be paid by the vendees as a condition of their being relieved of their default, he may still treat the $1,000 note as a subsisting enforceable obligation.

The contract, however, provided that when paid the note shall apply as part of the purchase price. The note was not paid when the foreclosure action was commenced and the plaintiff then elected to treat it as a part of the subject matter to be disposed of in that suit; saying in effect that he desired either payment of this note and the other amounts then due or title to the land.

If the defendants had paid the determined amounts they would have been reinstated in the contract and the note would have been paid and canceled. Their failure to pay left the other alternative to plaintiff, which he accepted. He again became the owner and in possession of the land, and the contract between the parties was effectually canceled as of the time of the judgment. The note here, as between the parties, had no more effect than if embodied as a clause in the contract as a promise to pay $1,000 as of the date when the note was to become due. When plaintiff took the land he thereby relieved defendants from any unperformed obligations of the contract, for he could not have both the land and also any future benefits

secured by the contract. His present position towards this $1,000 is inconsistent with the position that he assumed towards the same item in the perfected foreclosure proceedings. Having so elected he is bound. *Shenners v. Pritchard,* 104 Wis. 287, 80 N. W. 458; *Foster v. Lowe,* 131 Wis. 54, 110 N. W. 829; *Waite v. Stanley,* 88 Vt. 407, 92 Atl. 633, L. R. A. 1916C, 886 and note p. 893; *Roney v. H. S. Halvorsen Co.* 29 N. Dak. 13, 149 N. W. 688; 39 Cyc. 1923; *Wotring v. Shoemaker,* 102 Pa. St. 496; *Steiner & Sons v. Baker,* 111 Ala. 374, 19 South. 376.

That a different rate of interest was provided to be paid on the note than on other payments required under the contract is immaterial. That the defendants may have benefited by the use of the property, rent and tax free, or that they may have decreased its value, cannot affect the result herein. Such matters might have been proper for consideration in the foreclosure action or in an action to enforce the contract, if plaintiff had elected to bring such, but cannot be considered here.

By the Court.—Judgment affirmed.

ESTATE OF KLEINSCHMIDT: KLEINSCHMIDT, Respondent, vs. KLEINSCHMIDT and others, Appellants.

May 2—May 21, 1918.

Contracts: Validity: Agreement to pay money for not contesting will: Executors and administrators: Claims against decedent: Filing: Uncertainty as to maturity: Ascertaining present value: Statutes construed: "Accrue or become absolute:" Contingent claims.

[1. Whether a contract by which, in consideration of one son refraining from contesting his father's will, two other sons agreed to pay him a certain sum after their mother's death, was a valid agreement, is not considered in this case.]

2. A claim based on the written agreement of a decedent to pay a certain sum within sixty days after the death of his mother is one which will be barred under sec. 3844, Stats., unless presented within the time limited for filing claims against the estate of such decedent, the only uncertainty being as to the time when the obligation will mature.
3. By taking into consideration the mother's expectancy of life, "the then present value" of such a claim can be determined under secs. 3843, 3871*m*, Stats., with the same certainty as in the case of any other demand "payable at a future day."
4. Such a claim is not one which may be presented under sec. 3860, Stats., which provides that if the claim of any person shall "accrue or become absolute" after the time limited for creditors to present their claims, it may be presented and proved at any time within one year after it shall accrue or become absolute.
5. Nor is such a claim a contingent claim under secs. 3858, 3859, Stats., it being certain to become an actual liability, although the exact time when it will become due is uncertain.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Sometime prior to January 14, 1915, one Frederick Kleinschmidt died testate, leaving among his heirs three sons, Fred E., Albert H., and Edward Kleinschmidt. By the terms of his will, which was dated on or about December 14, 1911, his son Edward was bequeathed $5. After the death of Frederick Kleinschmidt and as his will was about to be offered for probate, the son Edward, being dissatisfied with the provisions of the will and threatening to contest the probate thereof, entered into an agreement with his two brothers wherein it was agreed that

"in consideration of the said Edward Kleinschmidt refraining from contesting said will, and for the further consideration of one dollar paid by said Edward Kleinschmidt to Fred E. Kleinschmidt and Albert H. Kleinschmidt, and each of them, the receipt whereof is hereby acknowledged, said Fred E. Kleinschmidt and Albert H. Kleinschmidt agree to pay within sixty days after the death of their mother, Albertina Kleinschmidt, to said Edward Kleinschmidt, each, the sum of $1,500, or $3,000 in all, said sum not to bear any in-

terest whatever until after the expiration of said sixty days hereinbefore set forth. The above and foregoing, together with a quitclaim deed of certain property situated in South Milwaukee, which has this day been delivered to said Edward Kleinschmidt, he, the said Edward Kleinschmidt, accepts in full of all claims and demands that he now has or that may hereafter accrue to him against his father's estate."

Said agreement was dated January 14, 1915. Albert H. Kleinschmidt died sometime prior to October 25, 1916, and administration of his estate was had in the county court of Milwaukee county. On October 25, 1915, that court made an order fixing the first Tuesday of May, 1916, as the last day on which creditors might file their claims against said estate. The mother died February 12, 1917. On May 5, 1917, Edward Kleinschmidt filed his claim against the estate of Albert H. Kleinschmidt for $1,500, based upon the agreement above mentioned. The county court disallowed the claim. An appeal was taken from such judgment of disallowance to the circuit court for Milwaukee county, where the judgment of the county court was reversed and the claim was allowed. From the judgment of the circuit court for Milwaukee county this appeal was taken by the minor heirs of the said Albert H. Kleinschmidt and his executrix.

The cause was submitted for the appellants on a brief signed by *Otto A. Lemke* of Milwaukee, guardian *ad litem*, and for the respondent on that of *Lawrence Conlan* of Milwaukee.

OWEN, J. The validity of the agreement between the Kleinschmidt brothers, upon which the claim here under consideration is based, has not been questioned. In view of the decision of this court in *Estate of Staab,* 166 Wis. 587, 166 N. W. 326, with reference to agreements between interested parties looking to the suppression of will contests, it would be unfortunate if, by our silence, it might be inferred that the agreement mentioned was regarded as a valid and bind-

ing contract by this court. Whether it be a valid agreement is not considered, for the reason that the question has not been raised by the parties, and for the further reason that the claim must be disallowed on grounds hereinafter stated. The purpose of this suggestion is merely to prevent any inference, which might be justified by our silence on the subject, that it was lawful and proper for the Kleinschmidt brothers to enter into the arrangement disclosed.

The allowance of the claim is contested by the minor heirs and the executrix on the ground that it should have been presented within the time fixed for the presentation of claims as required by the provisions of secs. 3840 and 3843, Stats., and, not having been presented within such time, was barred by the provisions of sec. 3844, which provides that "Every person having a claim against a deceased person, proper to be allowed by the court, who shall not after notice given as required by sections 3840 and 3840*m*, exhibit his claim to the court within the time limited for that purpose, shall forever be barred from recovering such demand or from setting off the same in any action." The claimant contends that the claim was properly filable under sec. 3860, which provides that any claim *accruing or becoming absolute* after the time limited for creditors to present their claims may be presented to the county court, proved, and allowed at any time within one year after it shall have accrued or become absolute. It will be seen that, under the provisions of sec. 3844, if the claim was a proper one to be filed against the estate within the time fixed for filing claims, it was barred because not so filed.

Sec. 3843 expressly empowers the court to try and decide upon all claims which by law survive against or in favor of executors or administrators and to examine and allow all demands "at the then present value thereof," which may be "payable at a future day," and to offset such demands in the same manner in favor of the estate. In *Austin v. Saveland's*

Estate, 77 Wis. 108, 45 N. W. 955, it was held that a joint and several note executed by the decedent, though not payable until after the expiration of the time limited for presenting claims, should have been presented as a claim within that time, and the failure so to present it barred the holder from recovery thereon against the estate. The only difference between the claim here presented and that considered in *Austin v. Saveland, supra,* is this: In that case the debt became due on a day certain in the future. In this case, while the claim is certain to become due, the date of maturity is uncertain. There is no uncertainty here as to the existence of the claim nor the amount thereof. Such facts are as certain as though the liability were created by a promissory note. They are as certain as they were in the *Saveland Case, supra.* That the obligation would become due sometime in the future is also certain under the terms of the agreement upon which the claim here is founded. The $1,500 agreed to be paid by Albert H. Kleinschmidt was to become payable sixty days after the death of the mother. That is an event certain to happen, although the date upon which it will happen is uncertain. We do not think this circumstance removes the claim from those required to be filed within the time limited for filing claims against the estate. This claim could have been dealt with by the county court and the present value thereof determined just as well as though the amount had been made payable at a day certain in the future. Sec. 3871*m* supplies a definite rule for computing the present value of any estate, annuity, or interest of any beneficiary when necessary to be computed in the settlement of estates. We see no reason why this rule could not have been applied in determining the present value of the claim under consideration, and it was in fact suggested by the claimant in a petition filed November 8, 1916, praying for the allowance of this claim. By taking into consideration the mother's expectancy of life, the then present value of the claim could

have been ascertained with the same certainty that any other claim due in the future could have been determined.

This is not a claim falling under the provisions of sec. 3860. While it is neither necessary nor desirable to undertake a definition embracing all the claims falling under that section, the nature of the claims comprehended thereby are well illustrated by the following cases: *Logan v. Dixon,* 73 Wis. 533, 41 N. W. 713; *Webster v. Estate of Lawson,* 73 Wis. 561, 41 N. W. 710; *C. & J. Michel B. Co. v. Estate of Wightman,* 97 Wis. 657, 73 N. W. 316; *Estate of Ryan,* 157 Wis. 576, 147 N. W. 993. A little reflection will suggest other classes of claims which no doubt fall within the provisions of sec. 3860. But a consideration of the cases above cited is sufficient to indicate pretty conclusively that this is not one of them. Neither is this a contingent claim, such as is provided for by secs. 3858 and 3859. A contingent claim exists only where there is uncertainty as to whether it will ever become absolute. It is the uncertainty concerning an eventual actual liability that makes it contingent. A claim which is certain to become an actual liability at some time in the future is not contingent merely because the exact time when it will become due is uncertain. *South Milwaukee Co. v. Murphy,* 112 Wis. 614, 88 N. W. 583, and cases there cited.

We must hold that the circuit court was in error in its judgment allowing this claim.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the judgment of the county court.

AGNEW, Respondent, vs. SUN INSURANCE OFFICE and another, Appellants.

May 2—May 21, 1918.

Fire insurance: Policies construed: "Additions" to building.

1. The words "additions thereto," when used in a fire insurance policy with reference to a building, ordinarily refer to some structure physically attached to or connected with the building itself.
2. Where several detached farm buildings were covered by two policies, each building "and additions thereto" being insured separately for a specific amount, a wagon shed with chicken coop attached which was located twenty-four feet from the nearest of the buildings specified in one policy and fifty-eight feet from the nearest building specified in the other, and was not in any way attached to or connected with any other building, was not an addition to any of the insured buildings within the meaning of the policies.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The appeal is from an order overruling a general demurrer to the complaint. The action is to recover on two fire insurance policies covering certain farm buildings owned by plaintiff. It appears by the complaint and map attached that there were five frame structures in the group of farm buildings on the plaintiff's farm, viz.: a dwelling house, a horse barn, a cow barn, a hay barn, and a wagon shed with chicken coop attached, the same being used for hitching and feeding of horses and the housing of buggies, wagons, and farm machinery. The several buildings mentioned were detached each from the other. The wagon shed and chicken coop was twenty-four feet distant from the house and fifty-eight feet distant from the cattle barn and was not in any way attached to or connected with any other building. This building was burned and the action is to recover for its loss. It is not specifically named in either policy. In the *Sun* policy of

$3,500 the sum of $2,200 is placed on the frame dwelling "and additions thereto," $500 on the frame horse barn "and additions thereto," $500 on the frame cow barn "and additions thereto," and $300 on the frame hay barn "and additions thereto." In the other policy of $1,000 the sum of $500 is placed on the frame cow barn "and additions thereto." The trial court held that the wagon shed, though not physically connected with any other building, was included within the words "additions thereto" and hence covered by the policies.

For the appellants there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

For the respondent there was a brief by *Charles T. Hickox* of Milwaukee, of counsel, and oral argument by *Andrew D. Agnew in pro. per.*

WINSLOW, C. J. Undoubtedly the words "additions thereto," when used with reference to a building, ordinarily refer to some structure physically attached to or connected with the building itself. We think the word "additions" was so used in the policies before us, with the idea of covering future enlargements. This seems to follow as a natural result from the fact that in the policies before us the various buildings insured are separately named and a specific sum placed on each building and the "additions thereto." Was the building destroyed an addition to some particular building, and if so to which building? The impossibility of picking out any particular building to which it was an addition, combined with the fact that the additions named in the policies are all additions to particular buildings, add strength to the view that the word was used in its usual and ordinary sense in the policies and hence that the building destroyed was not covered. Upon this question the citation of authorities would be of little value. Doubtless the word "additions" sometimes

is used to cover structures not physically connected with the principal building, and when that intent appears it will be so construed, but we are convinced that it was not used with that intent here.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer to the complaint.

YOUNGQUIST, Respondent, vs. L. J. DROESE COMPANY, Appellant.

May 3—May 21, 1918.

Master and servant: Liability for servant's tort: Scope of employment: Bonded carriers: Departure from licensed route.

1. A master is not liable for the tort of a servant unless the servant was acting within the scope of his employment when the tort was committed.
2. A driver employed to operate a jitney bus which was licensed to run only on a certain route, and who had been specifically instructed not to vary from that route, was not acting within the scope of his employment when, without the employer's knowledge or consent, he departed from such route to take a passenger to his home; and the employer is not liable for an injury to such passenger caused by negligence of the driver while so off from the route.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action for damages begun in the civil court of Milwaukee county. In the fall of 1915 the defendant was operating a licensed Ford jitney bus in the city of Milwaukee. Its route was Fond du Lac avenue. On November 3d of that year plaintiff, who lived on the Port Washington road outside the city of Milwaukee, hired Meyer, the driver of the jitney bus, to take him from the corner of Twentieth and Hadley streets in Milwaukee to his home, and paid him one dollar for the

service. On the way home plaintiff was injured by the bus running into an excavation in the Port Washington road. Meyer was engaged by the defendant as driver of the bus and was paid for his services fifty per cent. of the fees collected. It appears from the evidence that he occasionally deviated from his route and that he had before driven the bus out to plaintiff's home several times. It does not appear, however, that the defendant knew of such deviation from the route, and it is in evidence that once the defendant cautioned Meyer not to deviate therefrom. The jury by a special verdict found: (1) That in undertaking to carry plaintiff to his home on the Port Washington road the driver was acting within the general scope of his employment; (2) that the driver failed to exercise ordinary care in managing and operating the automobile at and just prior to the injury; (3) that such failure to exercise ordinary care was the proximate cause of the injury; (4) that plaintiff was free from contributory negligence; and (5) that he sustained damages in the sum of $250. Judgment in favor of plaintiff was entered upon the special verdict. Defendant appealed to the circuit court, and from a judgment of that court affirming the judgment of the civil court it appealed to this court.

Arthur H. Koenitzer of Milwaukee, for the appellant.

For the respondent there was a brief by *Joseph G. Hirschberg,* attorney, and *Horace B. Walmsley,* of counsel, both of Milwaukee, and oral argument by *Mr. Hirschberg.*

VINJE, J. If defendant's contention that there is no evidence to show that the driver, Meyer, was acting within the scope of his authority in taking plaintiff out on the Port Washington road is well taken, then the other errors complained of become immaterial. It is undisputed that defendant had a license to run a jitney bus on Fond du Lac avenue and nowhere else. There is evidence to show that the driver had several times previous to the injury to plaintiff been out to the home of the latter with the jitney bus, but no evidence

to show that defendant knew of such fact and nothing to charge it with notice thereof. Mr. Droese, on behalf of defendant, testifies that he did not know that the driver went out of his route; that about three days prior to the accident he learned that Meyer had taken a Mr. Roberts outside of the route, and that he then told Meyer that he was not allowed to go outside of the route. He denies positively that he knew Meyer had been out on the Port Washington road, and he refused to receive the dollar paid by plaintiff for the trip, though that refusal was after he learned of the injury to plaintiff. It is in evidence that sometime in October the driver gave plaintiff a card stating: "Call for George Meyer, driver, Kilbourn 2100, L. J. Droese, 2010 Fond du Lac Avenue." This we do not deem very significant because it fails to show it was done with defendant's knowledge or consent. Such cards may have been used on the route with defendant's consent, but there is nothing to show any authority to use them elsewhere.

It is elementary that in order to hold a master liable for the tort of a servant the latter must have been acting within the scope of his employment when the tort was committed. The employment of the driver in this case was to run a jitney bus on Fond du Lac avenue. Neither the servant nor master had any license to run elsewhere. That was the only route permitted by the license; that was the route the defendant directed the driver to follow, and that was the only route it believed or had reason to believe he did follow. He was specifically instructed not to vary from it. It is needless to consider defendant's liability in a case where he knew his servant departed from the route, for this is not such a case. Upon the whole evidence we are convinced that there is no basis therein for the finding of the jury that Meyer was acting within the scope of his employment in taking plaintiff to his home at the time of his injury.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint upon the merits.

GUARDIANSHIP OF KNOLL and another: STATE BOARD OF CONTROL, Appellant, vs. KNOLL, Respondent.

May 3—May 21, 1918.

Parent and child: Guardianship of children committed to state public school: Parent's right to custody: Petition: Amendment: Jurisdiction of county and circuit courts.

1. An order made by a county judge committing children to the state public school at Sparta is not an order appointing a guardian or reviewable as such by the circuit court. The state board of control becomes the guardian of children so committed, not by appointment, but by force of the statute (sec. 573*d*).
2. No notice of the proceeding for commitment of children to the state public school being required by the statute to be given to the parents, such commitment does not foreclose the right of the parent, when competent, to resume the care and custody of the children; and the fact that the parent was present at the hearing before commitment is immaterial.
3. Where children were committed to the state public school on the ground that their father had abandoned them and their mother was not a fit and proper person to have their care, custody, and control, the county court has jurisdiction afterwards, upon a proper petition by the mother stating the facts and alleging her present ability to support and care for the children and that because of reformation or for some other reason she is now a fit and proper person to have their care and custody, to determine the question whether such care and custody should be awarded to her and to make an order accordingly.
4. A petition by the mother in such a case, asking that she or some other suitable person be appointed guardian of the children, is treated as asserting the mother's right to their care and custody, and the amendment thereof so as to state the proper grounds upon which to proceed is permitted.
5. The proceeding upon a proper petition in such case is not strictly a proceeding to appoint a guardian, but is nevertheless one which affects the person and the right to the custody of minors who, under sec. 573*f* and the general provisions of the statutes relating to guardianship of minors, are in effect wards of the court.
6. The jurisdiction of the county court in such a case is concurrent with that of the circuit court in like matters; but such juris-

diction of the circuit court will not be exercised originally unless it appears that the county court cannot grant relief as adequate, complete, prompt, and efficient as can be granted by the circuit court.

APPEAL from an order of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Affirmed in part.*

Guardianship. On September 11, 1913, the county judge of Walworth county, upon hearing, found that Henry Knoll and Marie Knoll, infants, were in need of proper care, protection, and control, and in danger of becoming confirmed in vice; that they were sound in mind and body; that the mother, *Bertha Knoll,* was not a fit and proper person to have the care, custody, and control of said children; that the father had abandoned the children and his whereabouts was unknown, and that the children were neglected. Upon said findings and other findings of formal matters the court directed that said children be committed to the state public school at Sparta, and they were accordingly committed. In September, 1917, the mother, *Bertha Knoll,* filed a petition in the county court of Walworth county in which it was alleged that Marie Knoll was born July 22, 1906, and Henry Knoll in May, 1908; that the whereabouts of said minors was then unknown to petitioner; that the father of said minors abandoned said children in 1911; that the minors are not the owners of any real estate or personal property; that they have an expectant estate in the homestead of the petitioner where she now resides, which homestead is in the name of the petitioner; that all her children shall share equally in her property at the time of her death, and "while said minors have no property within the state of Wisconsin at the present time, yet your petitioner is of the opinion that it would be for their best interests to have a guardian appointed as by law." Upon the hearing of the petition the *State Board of Control* appeared and objected on the ground that the county court

had no jurisdiction to appoint a guardian, for the reason that under the provisions of sec. 573*d*, Stats., the *State Board of Control* became and still is the guardian of said children. The objection of the *State Board of Control* was sustained and the county court dismissed the petition. From such order the petitioner appealed to the circuit court for Walworth county, notice of which was given in the manner prescribed by the county court. Upon hearing before the circuit court that court entered the following order:

"Ernst Merton, Esq., appears for the petitioner.

"The attorney general, by Ray Bowers, Esq., district attorney, appears for the *State Board of Control,* contending that this court has not jurisdiction in the premises for the reasons above stated; and the court having considered the matter and being advised thereof and being of the opinion that the commitment of children to the state public school and the statutory guardianship of the *State Board of Control* of children so committed is to serve particular conditions specified in the statutes, and is of special, temporary, and emergency character, that upon proper showing that the cause for such commitment no longer exists and that the petitioning parent is able to furnish suitable support and is a proper and suitable person to be intrusted with the custody, control, and nurture of the children of whose custody, control, and nurture such parent has been by law deprived, such parent is of right and by law entitled to have the custody, control, and nurture of said children restored; and being mindful of the natural rights of suitable parents and that the primary and fundamental consideration is the welfare of the child and that said petitioning parent should have opportunity to be heard herein, hereby

"Adjudges and decrees: That the court depriving the parents of such custody, control, and nurture, committing such child to other custody or guardianship, always has jurisdiction, upon proper showing, to review, reconsider, and amend its orders and judgments theretofore made concerning such child; that the county court of Walworth county had and has such jurisdiction in the instant matter, and that this court

now has and may exercise jurisdiction to review the action and order of the county court in question in the instant appeal.

"Further ordered and adjudged: That the order and judgment of the county court of Walworth county that it has no jurisdiction in the premises be and the same hereby is reversed.

"This court having full jurisdiction in the premises and being willing to exercise it, it is

"Further ordered and adjudged: That within twenty days after service of a copy of this order upon it the *State Board of Control* of the state of Wisconsin inform this court and Ernst Merton, attorney for petitioner, of the whereabouts and address of said Marie Knoll and Henry Knoll, in whose physical custody they are, or show cause why the custody, control and nurture, and guardianship of said Marie Knoll and Henry Knoll should not be restored and granted to said *Bertha Knoll,* their mother; inform said attorney and this court as to the nature and character of any contracts and instruments of indenture existing and controlling said Marie Knoll and Henry Knoll if they are elsewhere than at said state public school, or to show cause why the bodies of said Marie Knoll and Henry Knoll should not be produced before this court at a time to be hereafter fixed."

The *State Board of Control* appeals from the order of the circuit court.

For the appellant there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

Ernst Merton of East Troy, for the respondent.

ROSENBERRY, J. The county judge found upon the hearing in 1913 that the mother was not a fit and proper person to have the care, custody, and control of the children; that they had been abandoned by their father; and that it was necessary in order to secure proper care, protection, and control to commit them to the state public school at Sparta. The mother in her petition does not allege any change in her cir-

cumstances, and upon the general allegation that "your petitioner is of the opinion that it would be for their best interests to have a guardian appointed by law," seeks to deprive the *State Board of Control* of the custody of the two children in question.

The first claim made is that the order commiting the children to the state public school at Sparta, having been made by the county judge who acted as a mere magistrate, is therefore subject to review. *Guardianship of Klein,* 95 Wis. 246, 70 N. W. 64. In that case it was held that the circuit court might, upon petition, determine who the guardian of the child should be, and that it was not concluded in that respect because the county judge had made an order awarding the custody of the child in question to another person under the provisions of sec. 4587*b,* S. & B. Ann. Stats.

It has been held that the county judge has authority, sitting as a magistrate, to commit minors to the state industrial school. *Wis. Ind. School for Girls v. Clark Co.* 103 Wis. 651, 79 N. W. 422; *State ex rel. Spritka v. Parsons,* 153 Wis. 20, 139 N. W. 825.

It is to be noted that the order of the county judge does not appoint the *State Board of Control* guardian of the said children. The children are by said order committed to the state public school at Sparta. The order itself contains no provision in regard to guardianship and therefore is not such an order as that made by the county judge in *Guardianship of Klein, supra.*

The *State Board of Control* does not become the guardian of the children in question by appointment of the county court of Walworth county, but when said children are committed to the state public school at Sparta, the statute provides (sec. 573*d*):

"The said board of control is hereby made the legal guardian of all children who shall become inmates of said school, and it shall be its duty to use special diligence in providing

suitable homes for them. It may place them in families and make written contracts with responsible and suitable persons that the children shall be kept during their minority, or, in the discretion of the board, until they attain the age of eighteen years; provide therein for their education in the public schools where they may reside, for teaching them some useful occupation, for their kind and proper treatment as members of the families in which they are placed, and for the payment, on the termination of such contracts, to said board, for the use of the children, of such sum of money as may have been stipulated in the contracts."

While the petition of the mother in form asks that she or some other suitable person be appointed guardian of said minors, we take it that the right which the petitioner is attempting to assert is that she is entitled to the custody of her minor children if she is of sufficient ability to care for them and a fit and proper person to have their care and custody, and that she cannot be deprived of that right in a summary proceeding under a law which requires no notice of the proceeding to be given to her, and we shall regard the petition as asserting that right, although it does not in terms do so.

We think this contention of the petitioner is sound. This court in *Schiltz v. Roenitz,* 86 Wis. 31, 40, 56 N. W. 194, said:

"The contention that the county court could, without notice to the plaintiff or opportunity to him to defend against the charge of abandonment, grant an order depriving the plaintiff of his most sacred natural rights in respect to his child, so jealously guarded and protected by the laws, offends against all our ideas affecting the administration of justice, and is opposed to the principles which lie at the foundation of all judicial systems not essentially despotic in their character and methods of procedure. It is provided by the Fourteenth amendment to the constitution of the United States that 'no state shall . . . deprive any person of life, liberty or property without due process of law.' Due process of law, as applied to judicial proceedings, includes a charge before some judicial tribunal, and notice to the party in some form, either actual

or constructive, and an opportunity to appear and produce evidence in his defense and be heard by himself or counsel. To proceed to adjudicate in the absence of notice to the party 'would be contrary to the first principles of the social compact, and of the right of administration of justice.' "

In *Milwaukee Industrial School v. Milwaukee Co.* 40 Wis. 328, 339, the court said:

"We cannot think that it was intended to foreclose the right of a parent, when competent, to resume the custody and care of his child. In this respect there is a significant difference between it and the statute before the court in *People v. Turner,* [55 Ill. 280]. That statute provided for process against the parent or guardian of the child, making them parties to the proceeding and apparently bound by it. The statute before us carefully avoids that difficulty, and operates, so to speak, upon the child *in personam,* without citing the parent or guardian, without any color of intent to bind the parent or guardian by the proceeding or by the commitment. It appears to us quite obvious, upon familiar principles, that the parent or guardian is not precluded by the commitment from asserting any right to the custody and care of the child, which he may be afterwards able to establish. . . . The commitment during minority binds the child only; not the parent or guardian, when competent to fulfil towards the child the duties assumed by the state. It is conclusive as between the school and the child; but not as between the school and the parent or guardian. The statute is a humane one, and should not be bent to a construction inconsistent with one of the dearest rights of humanity." See 120 Am. St. Rep., note p. 598.

We must hold, therefore, that the right of the petitioner to the custody of her minor children is not foreclosed by a proceeding, notice of which was not required to be given to her under the terms of the law.

The fact that the petitioner was present at the hearing on the first petition which resulted in the commitment of the minors is immaterial, the statute not requiring any notice to be given to her. Having under consideration an act conferring the power of eminent domain upon a municipality, the

statute not requiring any notice to be given, but it appearing that the property owner was present, this court said:

"It is not seen, therefore, how, if the plaintiff had been notified of the time and place of meeting, or if he had been present at such time and place but taking no part, either circumstance could have availed to cure the defect or render the proceeding of any validity. It is the omission or unconstitutional feature in the statute which vitiates, and that can be cured only by the legislature itself, or, in particular cases, it may be, by the waiver or voluntary abandonment of his constitutional rights by the landowner, who has that power." *Seifert v. Brooks,* 34 Wis. 443, 448.

Has the county court of Walworth county jurisdiction, upon the proper petition, to hear, try, and determine whether or not the petitioner is of sufficient ability to support the minors and is a fit person to have their care and custody, and to award the custody of said minors to the petitioner?

Had the county court declined to proceed further upon the petition filed in this case on the ground that the petition did not state facts calling for any exercise of the equitable powers of the court, its determination would have been correct. The county court, however, did not decline to proceed upon that ground, but upon the ground that it had no jurisdiction in the premises. If the petition had alleged the facts as to the former commitment of the children and further alleged that the petitioner, the mother, by reason of her changed circumstances (indicating with some particularity at least the degree of the change), was now of sufficient ability to support and care for the children, and that because of reformation or for some other reason she was now a fit and proper person to have their care and custody and asked a determination thereon, and if found to be a proper person and to be of sufficient ability to have the care and custody of the children that their care and custody be awarded to her, a different question would have been presented. It is clear that upon such a petition, proper notice being given, the county court would have jurisdiction over the subject matter of the petition.

By the provisions of sec. 573*f*, Stats., as well as by the general provisions of the statutes in regard to guardianship of minors, the county court is given jurisdiction of the person of minors. This in effect constitutes the minor a ward of the court, and in the exercise of this jurisdiction it has all the powers of a court of equity as well as a court of law in the premises. While the proceeding upon a proper petition in a matter like the one before us is not strictly a proceeding to appoint a guardian, it is nevertheless one which affects the person and the right to custody of a minor who is the ward of the court. The county court, therefore, has jurisdiction in the premises. This jurisdiction is concurrent with that of the circuit court in like matters. But the jurisdiction of the circuit court will not be exercised originally in matters wherein the county court has jurisdiction, unless it appears that the county court cannot grant relief as adequate, complete, prompt, and efficient as can be granted by the circuit court. *Glasscott v. Warner,* 20 Wis. 654; *Guardianship of Klein,* 95 Wis. 246, 70 N. W. 64; *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704; *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304; *Wisdom v. Wisdom,* 155 Wis. 434, 145 N. W. 126.

Upon the petition being amended so that it will show proper grounds upon which to proceed, the county court will fix a time and place for hearing, give notice thereof to all parties in interest, and determine judicially whether or not the petitioner is of sufficient ability to properly support and care for the minors in question and is a fit and proper person to have their care and custody.

By the Court.—That part of the order appealed from reversing the order of the county court dismissing the proceeding is affirmed. The remainder of the order appealed from is set aside. The clerk of this court is directed to return the record in this case to the county court of Walworth county for further proceedings in accordance with this opinion; no costs to be taxed by either party.

OWEN, J., took no part.

HOLMEN CREAMERY ASSOCIATION and another, Respondents, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Appellants.

May 3—May 21, 1918.

Workmen's compensation: Who are employees: "Casual employment:" Making repairs on building.

1. The term "employment," as used in sub. (2), sec. 2394—7, Stats. 1915, refers to the nature or kind of service rendered rather than to the nature of the contract of hiring.
2. An employment which "is but casual," within the meaning of said statute, is one which is only occasional, or comes at uncertain times, or at irregular intervals, and whose happening cannot be reasonably anticipated as certain or likely to occur or become necessary or desirable.
3. Repairs upon a building used for business purposes are an essential part of the business and, though they come at irregular intervals and the exact time when they will be needed cannot be foretold, are to be anticipated, provided for, and made when necessary or convenient; hence, although a workman who was injured while making repairs on a creamery building had been, on that as on several previous occasions, specially hired for the repair work only, his employment was not merely "casual," within the meaning of sub. (2), sec. 2394—7, Stats. 1915.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to vacate an award of the *Industrial Commission* allowing compensation to the defendant *Wallum* for injuries sustained by him while in the employ of plaintiff *Holmen Creamery Association.* There is no dispute in the facts. *Wallum* was hired by the manager of the *Creamery Association* to make some repairs on the creamery consisting of mason work and plastering inside and outside of the building. He started to work about 10 o'clock in the forenoon of November 26, 1916, and was injured about 3 o'clock in the afternoon of the same day. He had previously worked for the *Creamery Association* off and on and had built part of

the building, but had never been steadily employed by it. He was always hired specially whenever he did repair work for it, and was paid by the hour or day. It was understood that when these repairs were completed his employment terminated and that if he rendered further services it would be under a new employment. The circuit court vacated the award on the ground that the employment of *Wallum* was but casual within the meaning of sub. (2), sec. 2394—7, Stats. 1915. The *Industrial Commission* and *Wallum* appealed.

For the appellant *Industrial Commission* there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

For the respondents the cause was submitted on the brief of *Roehr & Steinmetz,* attorneys, and *Julius E. Roehr,* of counsel, all of Milwaukee.

VINJE, J. The question raised by the appeal is, Was *Wallum* at the time of his injury an employee of the *Holmen Creamery Association* within the meaning of the Workmen's Compensation Act? Sec. 2394—7 of that act provides that

"The term 'employee' as used in sections 2394—1 to 2394—31, inclusive, shall be construed to mean: . . .

"(2) Every person in the service of another under any contract of hire, express or implied, oral or written, . . . but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession or occupation of his employer." Stats. 1915.

In 1917 the legislature amended this section by striking out the words "is but casual or," so that in the future cases like the present will not arise.

It is quite evident that the term "employment" used in the quoted section refers to the nature or kind of service rendered by the employee rather than to the nature of his contract of hiring. The true test, therefore, is whether the service

rendered or the work done by the employee is of a casual nature. The difficulty of applying this test lies not so much in the selection of a correct definition of the adjective *casual* as in determining whether a given state of facts comes within the definition selected. Our standard dictionaries give six or seven different definitions of the word, only two of which need be considered. The first or primary meaning of the word is "happening or coming to pass without design, and without being foreseen or expected, accidental, coming by chance." The secondary meaning is "coming without regularity or at uncertain times, occasional, incidental." Neither of these definitions alone exactly fits the meaning of the word as used in the statute. As therein used it implies an element of chance or lack of design or intention as to the occasion that gives rise to the employment, but not as to the hiring or service to be rendered when such occasion has arisen. Hence, an employment that is only occasional, or comes at uncertain times, or at irregular intervals, and whose happening cannot be reasonably anticipated as certain or likely to occur or to become necessary or desirable, is but a casual employment within the meaning of the statute. It is one that arises occasionally or incidentally and is not a usual concomitant of the business, trade, or profession of the employer. *Gaynor's Case,* 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363; *Uphoff v. Industrial Board,* 271 Ill. 312, 111 N. E. 128, L. R. A. 1916E, 329; *Thompson v. Twiss,* 90 Conn. 444, 97 Atl. 328, L. R. A. 1916E, 506; 1 Honnold, Workm. Comp. § 62; L. R. A. 1916A, 247, note; *Id.* 365, note.

The defendant *Creamery Association* was engaged in the business of conducting a creamery. For the proper conduct of such a business a building was necessary. It is the common experience of mankind that buildings need repairs from time to time. Indeed, it is so common that the Income Tax Law allows for the deduction of repairs from rentals received,

and all business concerns of any magnitude provide for a repair account or a fund to meet such expenses. It is in evidence that the claimant here had several times repaired this building. The making of repairs, therefore, belongs to the category of things to be expected and provided for. True, repairs come at irregular intervals and one cannot accurately foretell just when they will be needed. But needed they will be in any business that endures for any considerable length of time. They are therefore a part of the employer's business, to be anticipated and met when necessity or convenience dictates. Being an essential and integral part of every business employing material things in its prosecution, no reason is perceived why one employed to make them should not be classed as an employee of the one for whom they are made. They are essential to the successful prosecution of every business whose implements are subject to the corroding touch of time and a usual concomitant thereof. They are foreseen, provided for, and made when necessary or convenient. The fact that one cannot exactly foretell just when they will have to be made is immaterial. On the same principle a proprietor of a meat market who has to hire extra help Saturdays or on busy days, though at irregular intervals, and does so, makes such extra help an employee within the meaning of the statute. *Jordan v. Weinman, post,* p. 474, 167 N. W. 810. And because the cleaning up after repairs is a part of the repair work, one employed to do that is an employee within the act. *F. C. Gross & Bros. Co. v. Industrial Comm., post,* p. 612, 167 N. W. 809.

By the Court.—Judgment reversed, and cause remanded with directions to reinstate and confirm the award of the *Industrial Commission.*

OWEN, J., took no part.

JORDAN and another, Appellants, vs. WEINMAN and another, Respondents.

May 4—May 21, 1918.

Workmen's compensation: Who are employees: "Casual employment:" "Mistake" in award: Correction after action brought: Modification of award, how and when made.

1. Where one was called in at irregular intervals when extra help was needed or when a regular employee was absent, and worked at the regular business carried on by his employer, his employment was not "casual," within the meaning of sub. (2), sec. 2394—7, Stats. 1915.
2. Where at the time of the hearing before the industrial commission all parties to the proceeding supposed that the only injury to the claimant was the loss of the fingers of one hand, and the award was made on that supposition, but it was afterwards discovered that there was also a loss of a part of the bones of the hand, this was a "mistake," within the meaning of sec. 2394—17, Stats., which might be corrected by the commission by modifying the award, even though an action to review the award had already been brought.
3. Modification of an award, when authorized by sec. 2394—17, Stats., may be accomplished as well by vacating it and entering an entirely new award as by making simply an order of modification and letting the original award stand as modified.
4. Where the mistake is such that a further hearing is necessary and, because ten days' notice of the hearing must be given to parties interested, the modification of the award cannot be made "within twenty days from the date thereof," as provided in sec. 2394—17, Stats. 1917, that requirement of the statute is satisfied if the proceedings to correct the mistake be commenced and the notice of hearing be given within the twenty-day period and pressed to a conclusion with all convenient speed.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment confirming an award of the *Industrial Commission.* It appears that the *Commission* made an award in favor of the defendant *Weinman*

September 24, 1917, and an action was commenced by *Jordan* to review the same October 5, 1917; that the *Commission* of its own motion set aside this award October 9, 1917, without notice to appellants, on the ground of mistake, and held a further hearing at which all parties were present on October 26th, and on October 29th made new findings of fact and a larger award. Action was commenced to review their second award November 9, 1917, and the two actions were consolidated and by the judgment the second award was confirmed.

The plaintiff *Jordan* conducted a butcher shop in which was a sausage machine run by a motor. The claimant, *Weinman,* is a boy seventeen years of age living at his father's home in the vicinity. He was from time to time employed at the butcher shop as a helper. From September 19th to Thanksgiving day, 1916, he worked every evening after school and all day Saturday. From Thanksgiving day until the Christmas vacation he did not work there at all. From January 1st up to the time of the accident (June 4, 1917) he worked at various times, Saturdays mostly, though not every Saturday; sometimes two days in the week. Whenever *Jordan* needed extra help or when some regular employee was off he was called in. On the day of the accident the applicant was running the sausage machine and his hand was drawn in, cutting off all the fingers of the left hand.

For the appellants there was a brief by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

For the respondent *Weinman* there was a brief by *Crownhart & Wylie* of Madison, and oral argument by *C. H. Crownhart.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

WINSLOW, C. J. The claimant was called in at irregular intervals when extra help was needed or when a regular employee was absent, and worked at the regular business carried on by *Jordan* at the shop. Within the logic of the cases of *Holmen C. Asso. v. Industrial Comm., ante,* p. 470, 167 N. W. 808, and *F. C. Gross & Bros. Co. v. Industrial Comm. post,* p. 612, 167 N. W. 809, it must be held that this employment was not casual.

A question as to the power of the *Commission* to make the second award is raised, and it is claimed that it had no such power because (1) there was no mistake within the meaning of the statute in the first award; (2) the bringing of the action to review the first award suspended the power of the *Commission* to change that award; (3) it had only power to modify or change the first award, not to vacate the same, and such modification must be made within twenty days or not at all.

The statute provides (sec. 2394—17, Stats. 1917) that "the commission may on its own motion, modify or change its order, findings or award at any time within twenty days from the date thereof if it shall discover any mistake therein."

It appears that on the first hearing no medical testimony was taken. The claimant testified that his hand was all right except for the loss of the fingers, and his attorneys supposed that the entire injury was disclosed by mere inspection of the hand. Fourteen days after the first award was made, however, the commission learned by a statement made by Dr. Fox, the attending physician, that there was a loss of the greater part of the metacarpal bones as well as the fingers. On the following day they vacated the award and findings and notified the parties of another hearing to be held October 26, 1917, at which time both parties appeared and further testimony was taken, and on the 29th of October, thirty-five days after the making of the first award, the second award was made.

We think that there was here a mistake within the meaning of the act. It is doubtless true that it was not intended by the provision in question to provide for a new trial of a claim simply because additional testimony may be discovered by either party, but that was not the situation here. The claimant, his attorneys, the *Commission,* and in fact all parties to the proceeding, supposed that the only injury was the loss of the fingers, and the award was made on that supposition, whereas in fact there was a loss of a part of the bones of the hand. Giving the law that breadth of construction which its remedial purpose calls for, it must be held that this was a mistake within the contemplation of the statute, and hence that the award founded on it might properly be corrected. We cannot regard the contention that the bringing of the action to review the first award operated to suspend the power of the *Commission* to modify the same as worthy of any extended notice. The statute makes no such exception, and it would be legislation to all intents and purposes if the court inserted such an exception into the law.

The contentions that the *Commission* had no power to vacate its award and must make any modification therein within twenty days present much more doubtful questions. We cannot, however, regard either of them as well taken.

The power to modify the original award was given to the *Commission* for a well defined and beneficent purpose and the provision should be given no narrow construction. Modification of the original award may be accomplished as well by vacating it and entering an entirely new award as by making simply an order of modification and letting the original order stand as modified. The practical result reached seems to be the same in either case.

Nor can we entertain the idea that the modification must in all cases be made within the twenty-day limit. The intention was clearly to enable the *Commission* to correct any mistake discovered within the twenty days. In case the discovery was made on the nineteenth day it might well be that

it would be practically impossible to secure the attendance of necessary witnesses and take their testimony until after the expiration of the twenty-day period. In the present case the mistake was brought to the attention of the *Commission* fourteen days after the making of the original award. It was of such a nature that further testimony necessarily had to be taken to determine the extent of the change thereby made necessary in the award. Of course if additional testimony was to be taken, the opposing party should have notice of the hearing, and the statute (sec. 2394—16) prescribes a ten-day notice of hearing. The notice was given in the present case, and consequently the second award could not be made until after the expiration of the twenty-day period. Under the circumstances here presented, namely, where a further hearing is rendered necessary by reason of the nature of the mistake, and where, by reason of the requirement that a ten-day notice of the hearing be given to parties interested, the twenty-day period expires before the change in the award can be made, we hold that, if the proceedings to correct the mistake be commenced and the notice of hearing be given within the twenty-day period and pressed to a conclusion with all convenient speed, the requirement of the statute is satisfied. If the mistake be an error in computation or merely of a clerical nature not calling for further testimony, a contrary conclusion might well be reached, but as that question is not before us we express no opinion upon it.

By the Court.—Judgment affirmed.

OWEN, J., took no part.

VASEY and another, Appellants, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

May 4—May 21, 1918.

Workmen's compensation: Failure to give notice of injury: Employer not prejudiced.

A finding by the industrial commission and a holding by the trial court, to the effect that the failure in this case to give the notice required by sec. 2394—11, Stats., within thirty days after an injury to an employee, was not with the intention of misleading the employer and that he was not in fact misled thereby or prejudiced by being deprived of an opportunity either to investigate the claim or to furnish surgical aid which would have saved the employee's life, are *held* to have been warranted by the evidence.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment confirming an award of the *Industrial Commission* to *Evangeline Whitcomb,* widow of Al Whitcomb, who is alleged to have died as result of injuries while in the employ of *John Vasey.*

Whitcomb was employed as a swamper by *John Vasey,* and after the close of this employment entered into contract with *Vasey* by which he was to move his family to a camp near Ingram, have the use of the garden, and to work at peeling bark at $2.50 a cord. For the first two weeks after moving to the camp pursuant to this arrangement Whitcomb worked around the camp gathering wood for his family; then he started on his work for *Vasey.* On April 14, 1917, while engaged in peeling bark, Whitcomb is alleged to have slipped on a log, falling, and injuring his right testicle. He had great difficulty in getting back to his home, two miles away, and for a week and a half was in bed part of the time, and after that all of the time until he died on May 25th. The camp was ten miles from Ingram, and *Mrs. Whitcomb* was

obliged to walk that distance to secure supplies and medical aid for Whitcomb. These conditions resulted in leaving Whitcomb without medical assistance until May 21st, thirty-seven days after the accident. The physician who then attended him operated at the camp and then moved him to a hospital where he died. Previous to the physician's visit *Mrs. Whitcomb* had walked to Ingram and requested the storekeeper to send a doctor to the camp.

There is no evidence that the notice required by sec. 2394—11, Stats., was given within thirty days after the injury. On May 8th, twenty-four days after the accident, *Mrs. Whitcomb* mailed a letter from her husband to *John Vasey,* telling him that Whitcomb was sick and asking *Vasey* to come to the camp. A week later Whitcomb wrote, and *Mrs. Whitcomb* mailed another letter to *Vasey* in regard to Whitcomb's sickness.

The question of prejudicial failure to give the statutory notice within thirty days after the accident, and the question whether the death resulted from the injury or was a recurrence of an old trouble, were sharply contested at the hearing.

The *Commission* found that the death was proximately caused by the accident of April 14th, "that no notice in writing of claim for injury was given the respondent by Al Whitcomb within thirty days after the occurrence of the accident, but the failure to give notice in writing of the claim was not with the intention of misleading the respondent, and that the respondent was not in fact misled by such failure; that the respondent had notice of the applicant's claim for death benefit under the provisions of secs. 2394—3 to 2394—31, inclusive, of the Wisconsin Statutes within thirty days after the death of the said Al Whitcomb."

The plaintiffs claim that the *Commission* made its findings and award without authority and in excess of its powers. The circuit court confirmed the award, from which judgment appeal is taken.

For the appellants there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Arthur B. Doe,* of counsel, all of Milwaukee, and oral argument by *Mr. Doe.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

SIEBECKER, J. The trial court held that the failure to give the plaintiffs written notice of claim for compensation as required by the provisions of sec. 2394—11, Stats., did not bar recovery of compensation, because it appears that there was no intention to mislead plaintiffs and that plaintiffs were not in fact misled thereby. The record is clear on the point that the evidence abundantly supports the *Commission* in their conclusion that there was no intention on the part of the claimants to mislead plaintiffs by the failure to give this written notice. The finding of the *Commission* and the holding of the trial court to the effect that the failure to give such notice did not in fact mislead and prejudice plaintiffs is assailed upon the grounds that they were materially prejudiced by being deprived of the opportunity to investigate the claim as to whether or not Whitcomb's injury was proximately caused by accident while he was performing services growing out of and incidental to his employment; whether or not his death was caused by an alleged former injury, and that they were deprived of the opportunity to furnish medical and surgical aid which would have saved Whitcomb's life. An examination of the evidence discloses that the only eye-witness to the alleged accident was a twelve-year-old son, who testified in effect that his father slipped and fell "astraddle" a log on which he stood, that he got caught between the logs, that it took half an hour to get him released, that he could not continue his work, and that it took him several hours to walk the distance of two miles to the house. It is not to be

presumed that plaintiffs upon inquiry would have secured a different statement of facts from this boy than that to which he testified or that the facts and circumstances of the occurrence and nature of the injury were materially different from those that were disclosed by the evidence given before the *Commission*. We think the *Commission* was well justified in concluding that plaintiffs were not prejudiced in this respect by the failure to receive a written notice of the accident. The claim that Whitcomb's death was caused by a former injury is wholly unsupported. The wife's evidence that she never heard of this alleged former injury, which it is said he suffered after marriage; that he never complained thereof; and the son's denial of an alleged admission by him that his father had suffered such a former injury, on which this claim rests, is ample basis for the *Commission* to find that there is no proof of such fact. It is strenuously contended that if plaintiffs had received the required written notice they would have furnished prompt medical aid and that Whitcomb's life, in all probability, would have been saved. The trial court concluded that, in view of the undisputed fact that *Vasey* was notified by letter by Whitcomb within thirty days after the accident that Whitcomb had been sick for two weeks in bed and requested *Vasey* to come to see him, and that *Vasey* replied within the thirty days that he could not then come to see him but that he would come later, in connection with all the conditions surrounding the parties, the *Commission* was justified in finding as a fact that the necessary medical and surgical aid would not have been furnished to save Whitcomb's life. It must also be borne in mind that had the claimant served a notice of injury on the last of the thirty-day period prescribed by statute it is reasonably clear that Whitcomb's condition was such that any medical and surgical aid would have been unavailing to save his life. Upon the record it cannot be said that there is no substantial credible evidence to support the find-

ings of the *Commission* on the questions presented. The judgment of the circuit court must be affirmed.

By the Court.—It is so ordered.

OWEN, J., took no part.

WHITE, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

May 4—May 21, 1918.

Workmen's compensation: "Performing service growing out of and incidental to his employment:" Transfer of mail.

An employee, whose duty it was to transfer mail from a train on one railroad to a waiting train in a nearby station of another road, met the incoming train as it was coming to a stop at a crossing opposite said station and, the door of the mail car not being open as usual to discharge the pouch, climbed upon the side of the car to attract the mail clerk's attention or to ride upon the car to its depot. This method had been adopted and followed by others in doing the work, in order to expedite the transfer. In so boarding the car he fell and was fatally injured. *Held*, that he was at the time "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an appeal from a judgment of the circuit court confirming an award of the *Industrial Commission.*

The appellant, *A. O. White,* was on November 10, 1916, under contract with the United States government to transfer mail from the station of the Chicago, Milwaukee & St. Paul Railway Company to the station of the Chicago & Northwestern Railway Company in the city of Madison. One Andrew Behrend was at said time and for four weeks prior thereto in the employ of the appellant. On the even-

ing of November 10th, shortly before the arrival of the train over the Portage division of the Chicago, Milwaukee & St. Paul Railway, Behrend was on the platform of the Northwestern station for the purpose of receiving the mail and making the transfer. About the time the train was coming to a stop he climbed upon the side of the mail coach, took hold of the bars on each side of the middle door, slipped, and fell under the train, and received injuries from the effects of which he died.

The evidence shows that the appellant under his contract was required to meet the incoming train at the station, receive the mail, and convey it to the other station. There was evidence in the case that usually, when the train came to a stop opposite the Northwestern station or the intersection of the tracks, the employee of the appellant would be standing there and the mail dispatched to him at that point, but sometimes when the train did not stop, or when the mail clerk was busy and did not have time to dispatch the mail at that point, the employee of the appellant would board the train and ride across the street to the station of the Chicago, Milwaukee & St. Paul Railway Company, where the mail would be dispatched to him.

At the time in question the side door of the mail car was closed when the train approached on said evening of November 10th, and Behrend climbed upon the car, evidently with the idea of attracting the attention of the mail clerk and receiving the mail. There is evidence that employees did board the train under such circumstances.

For the appellant there was a brief by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

For the respondents there was a brief by the *Attorney General* and *J. E. Messerschmidt,* attorneys for the *Industrial Commission,* and *Kroncke, Sauthoff & Murphy* of Madison, attorneys for *Agnes Behrend;* and the cause was argued orally by *Mr. Messerschmidt* and *Mr. George Kroncke.*

KERWIN, J. The only question involved in this case is whether at the time of his death Behrend was in the employ of the appellant performing services growing out of and incidental to his employment within the meaning of the statute, sub. (2), sec. 2394—3.

It is contended on the part of the appellant that because Behrend attempted to board the train and in so doing received the injuries he was not performing services growing out of and incidental to his employment. We think the contention of counsel for appellant is too narrow. The mere fact that Behrend might have stood upon the platform and received the mail in that way as was done upon some occasions did not take him outside of the scope of his employment when he received it in a different way and in a way which doubtless, under the testimony, was considered proper.

The manner of performing the service which Behrend had adopted at the time of the injury was often carried out in the same manner by others in doing that work. It was a way which had been adopted and followed at least to some extent in the performance of the service. It was clearly service growing out of and incidental to his employment although there might be different ways of performing such service.

This court, as well as others, has held that the Workmen's Compensation Act should be liberally construed. *Northwestern I. Co. v. Industrial Comm.* 160 Wis. 633, 152 N. W. 416; *Manitowoc B. Works v. Industrial Comm.* 165 Wis. 592, 163 N. W. 172; *Beaudry v. Watkins,* 191 Mich. 445, 158 N. W. 16; *Andrejwski v. Wolverine C. Co.* 182 Mich. 298, 148 N. W. 684; *Robertson v. Allan Bros. & Co.* 1 Butterworth's Workm. C. C. 172; *Nicol v. Young's P. L. & M. O. Co.* 8 Butterworth's Workm. C. C. 395; *Bullworthy v. Glanfield,* 7 Butterworth's Workm. C. C. 191; *Harding v. Brynddu C. Co.* [1911] 2 K. B. 747. Many other cases might be cited showing the liberal construction which has been placed upon workmen's compensation laws in this country as well as in England.

The learned trial judge below wrote an opinion, which is in the record, and is clear and concise upon the subject, and shows that under the evidence in the case and the authorities cited Behrend was at the time of his injury performing services growing out of and incidental to his employment. He said:

"The evidence establishes without controversy that it was decedent's duty to transfer the mail at the place of accident; that the mail would not be given to the decedent to transfer at this point unless he was at the door of the mail car when it was opened to discharge the pouch; that the train stopped at this place for a railroad crossing, at which it is common knowledge that trains stop only long enough to come to the dead stop required by law; that if decedent was not at the door of the mail car when it was opened the pouch would be carried on to the depot; that the train to which the pouch was to be transferred was then standing at its depot, and that the mail-car door was not open to discharge the pouch at the point where deceased first met the mail car. It is apparent that decedent had but a limited time in which to perform his duty of transferring this mail.

"This state of facts does support the finding of the *Commission* that the decedent was performing services growing out of and incidental to his employment, especially when it is shown that others who had performed the same duty during the preceding fourteen years had ridden on the train while it was in motion in order to expedite the transfer of this mail. It was decedent's duty to get the mail and transfer it to the waiting train that was to carry it south. All that he did tended to expedite the performance of that duty. The fact that in so doing he was negligently exposing himself to danger does not warrant a denial of compensation."

We deem further discussion of the case unnecessary.

By the Court.—The judgment of the court below is affirmed.

OWEN, J., took no part.

STATE EX REL. CATLIN, Appellant, vs. GALLIGAN, Respondent.

May 4—May 21, 1918.

Quo warranto: Officers: Action to try title: Burden of proof: Elections: Qualifications of voters: Residence: "Habitation."

1. In an action of *quo warranto* to try title to an office, the burden of showing that alleged illegal voters were at the time of the election not residents of the town in which they voted, is upon the party alleging that fact.
2. Evidence that single men, residents of the state, had for more than ten days prior to the election in question been actually employed as guards at the only manufacturing plant in a town, lodging, taking their meals, and keeping their clothes at the barracks provided for them inside of the grounds of said plant, and that at the time of the election each of them intended to continue such employment and remain in the town indefinitely or permanently, considered that town as his home, had no other home and no intention of removing from the town, had not come into the town for any temporary purpose, and was self-supporting, is *held* to sustain a finding by the trial court that they were residents of the town, within the meaning of sec. 6.51, Stats., and legal voters at said election.
3. The barracks in which said guards lived, having all the equipment and conveniences of the ordinary home, were a proper place for a habitation, within the meaning of sec. 6.51, Stats.

APPEAL from a judgment of the circuit court for Ashland county: G. N. RISJORD, Circuit Judge. *Affirmed.*

Action of *quo warranto* to try title to the office of chairman of the town of Barksdale and tried in the court below without a jury, a jury trial having been duly waived. The court found as follows:

That at the spring election of 1917 in the town of Barksdale, Bayfield county, the relator and defendant were candidates for chairman, the defendant being a candidate for reelection; that the canvassing board certified that the relator had received sixty votes at said election and the defendant sixty-one; that both qualified, and the defendant assumed

the office of chairman of the town, which office he has since held and now holds; that at said election the votes of a number of unmarried "guards" at the Dupont de Nemours Company's plant in said town were challenged for the alleged reason that they were not residents and not legally entitled to vote at said election; that the number set out in relator's complaint as having been illegal votes was somewhat over thirty, but upon the trial it was agreed that the only votes in question were those of Adolph Nelson, Albert Johnson, L. Olson, John McGilvary, Ben Hanson, P. Farley, Edgar Hunt, B. Hicks, Neil McIntosh, Dennis Kelly, Clarence Enhelder, Ben F. Ganski, and Chris Bekken, who voted for the defendant, and O. A. Olson, Fred Brace, Lewis Hanson, H. McCluskey, Lawrence Cox, Glen Kellar, J. O. Sabon, and Clyde Aitken, who voted for the relator. On the trial it was further conceded by counsel for the relator that the votes cast by O. A. Olson, Fred Brace, and Lewis Hanson for the relator were illegal, and no evidence was offered as to the legality of the votes of H. McCluskey, Lawrence Cox, Glen Kellar, J. O. Sabon, and Clyde Aitken. The relator's complaint, however, alleges that the votes cast by the last five persons named were illegal votes, so that it was conceded that the relator at any rate did not receive to exceed fifty-seven legal votes. It was also conceded that the vote of Albert Zipperer, who voted for the defendant, had not been shown to be illegal, so the controversy hinges on the legality of the votes of the other thirteen above named who voted for the defendant.

That the said guards above named who voted for defendant were single men, and while employed as guards live in so-called barracks, which are buildings owned and controlled by the company and located inside of a wire fence surrounding the plant, and which barracks were fitted with places to eat, sleep, and bathe and with provisions for entertainment of the guards, consisting of card tables, books, etc.; that the barracks are used practically for the keeping of the guards only, and there is no access permitted to the barracks by any

one but the guards except upon permission given by the chief of the guards or the superintendent of the plant or other officer at the office of the plant located upon the grounds; that the barracks are not intended for occupancy by any one but guards and those employed there as cooks or otherwise, and when a guard's employment as such terminates he cannot make the barracks a home or place of residence; that the guards on duty are stationed at certain intervals along the wire fence surrounding the plant, and it is their duty to see that no one but employees or persons specially authorized enter the grounds inside of the fence; that said plant is located in the town of Barksdale and near a station called Barksdale; that most of the employees live at Washburn and are taken in and out by special trains, but some of the employees live in the neighborhood of the plant, mostly in the town of Barksdale, which town has no other industry of any consequence than the "Dupont plant" within its border, except farming; that the employment as guards at the plant is of indefinite duration and long service is encouraged in various ways by the company; that it seeks to obtain men who will remain permanently, and there is nothing to indicate how long the guards may be kept at the plant, but perhaps as long as the plant is running some guards at least will be retained; that the guards in question had no other domicile than the barracks and intended to remain at the barracks and in the company's employ as guards as long as the job lasted; that they are of various ages, all dependent upon their own earnings for their maintenance; that none of them who testified at the trial had a present intention to remove, though if their employment as guards terminated they would probably not remain in the town of Barksdale; that the fence had existed and guards had been employed for two or three years; that the company started out with about forty-five guards and at the time of the trial the number had increased to about eighty; that the plant was originally built for the purpose of manufacturing dynamite principally, but since the European

war started it has been largely engaged in the manufacture of war munitions.

That the foregoing facts apply generally to all the guards above named who voted for the defendant, except that some of them had been at the plant longer than others, and the following guards, namely, Albert Johnson, L. Olson, John McGilvary, Ben Hanson, Peter Farley, Neil McIntosh, and Dennis Kelly, voted in the town of Barksdale at the fall election of 1916 without their votes being challenged, while the others cast their first vote in the town at the spring election of 1917; and that they were all guards except Clarence Enhelder, who was a cook at the barracks; that Albert Johnson, L. Olson, John McGilvary, Ben Hanson, Peter Farley, B. Hicks, Dennis Kelly, and Ben F. Ganski were still guards at the time of the trial of the action, while Adolph Nelson, Edgar Hunt, Clarence Enhelder, and Chris Bekken had left, all because of having been discharged, except Adolph Nelson, who left because he expected to be discharged; that all of them were employed by the company on the day of election, and all who testified upon the trial stated that they considered Barksdale and the barracks their home.

The court concluded that all of the thirteen guards above named who voted for the defendant were legal voters in the town of Barksdale at the spring election of 1917, therefore defendant received sixty-one legal votes and the relator not to exceed fifty-seven, consequently defendant has a legal right to hold the office of chairman of the town of Barksdale.

Judgment was entered accordingly, from which this appeal was taken. The following errors were assigned: (1) The court erred in holding that the thirteen guards who voted for defendant were legal voters; (2) in holding that defendant received sixty-one legal votes; (3) in holding that the defendant has a legal right to hold the office of chairman of the town of Barksdale; (4) in ordering judgment in this action for the defendant.

For the appellant there was a brief by *Sanborn, Lamoreux & Pray* of Ashland, and oral argument by *A. W. Sanborn.*

Wm. F. Shea of Ashland, for the respondent.

KERWIN, J. The controversy here is over the legality of the votes of thirteen of the so-called guards employed at the Dupont plant. The inspectors found that the defendant had received sixty-one votes and the relator sixty. After the trial the court below found that the defendant had received sixty-one legal votes and the relator not more than fifty-seven. In his complaint the relator alleged that thirty votes cast for the defendant were illegal on the ground of nonresidence in the town of Barksdale of these voters. Of these thirty voters it was conceded that thirteen voted for the defendant and eight for the relator, and that of the remaining nine four omitted to vote on chairmanship, three were conceded to be legal voters, and two were not challenged, and it did not appear which candidate they voted for, if for either. Two of the thirteen voters in question had been at the plant upwards of two years at the time of trial, others were there throughout the same period. Eleven of the thirteen were challenged at the polls and each swore in his vote. Seven of the thirteen voted in the town at the general election in the fall of 1916. Seven of the thirteen were employed at the plant at the time of trial and testified for the relator. One had enlisted in November, 1917, three were discharged in August, 1917, and two quit the employment in 1917.

The evidence of eight of the thirteen guards was produced by relator on the trial. It showed that at the time of the election each was and for more than ten days had been actually employed in the town of Barksdale, working, lodging, and taking his meals and keeping his clothes at the barracks; that it was then his intention to continue such employment and remain in the town for an unlimited time, that is, indefinitely or permanently; that at the time of said election

he considered Barksdale his home and that he then had no other home and had no intention of removing from said town and had not come into the town for any temporary purpose and was self-supporting and was not dependent upon his parents or any one else for support. No evidence was offered to impeach the right to vote of the remaining five voters.

The sole question in this case is whether the alleged illegal voters were residents within the meaning of sec. 6.51, Stats. The burden was upon the relator to prove that the thirteen voters were not residents. *State ex rel. Hopkins v. Olin,* 23 Wis. 309; *State ex rel. Swenson v. Norton,* 46 Wis. 332, 1 N. W. 22.

The findings of the court below on this question are in favor of the defendant and cannot be disturbed unless contrary to the clear preponderance of the evidence. *Mechanical A. Co. v. A. Kieckhefer E. Co.* 164 Wis. 65, 159 N. W. 557.

The thirteen voters in question were all guards at the Dupont plant, the only manufacturing plant in the town of Barksdale. The plant had been in operation about twelve years, but its capacity had been largely increased since 1914, so that in 1917 about 1,500 men were employed. In 1915 the plant was placed under guard, and at the time of the election in the spring of 1917 the thirteen were guards. The guards whose votes are in controversy lived at the barracks inside of the grounds, were subject to strict discipline, and were under certain restrictions; they had lived in the state and at the barracks the requisite time to establish a residence; they had made the barracks their home. There is evidence tending to show that they had no other home while they were thus employed, and their habitation was fixed at the barracks; that they had no present intention of removing or changing their place of habitation or going elsewhere to reside; that they had a home at Barksdale and intended to return there when absent.

The mere fact that the employment might end sometime in the future alone does not necessarily make the residence temporary. The barracks where the guards lived had all the conveniences and equipments of the ordinary home, hence were a suitable and proper place for habitation. One may have his residence at a hotel. *Hughes v. State,* 109 Wis. 397, 85 N. W. 333.

The question turns upon the proper construction of sec. 6.51, Stats. Sub. 2 of this section provides: "That place shall be considered and held to be the residence of a person in which his habitation is fixed, without any present intention of removing therefrom, and to which, whenever he is absent, he has the intention of returning." Sub. 4 of this section reads: "A person shall not be considered to have gained a residence in any town, ward or village of this state into which he shall have come for temporary purposes merely." And sub. 9 reads: "The mere intention to acquire a new residence, without removal, shall avail nothing; neither shall removal without intention."

Under these provisions counsel for appellant contends that, while the voters in question resided at the barracks for more than the period required by the statute, still they were not qualified voters. It is said by counsel that habitation means more than residence; that habitation is a place where a man lives as his home, his domicile. Many cases are cited by counsel from other jurisdictions. The cases outside of our own in the main define home, habitation, domicile, and residence, and are in harmony with the decisions of this court in so far as the statutes of other states on this subject are the same as ours.

Counsel relies strongly upon *State ex rel. Small v. Bosacki,* 154 Wis. 475, 143 N. W. 175, which was a case of temporary employment in the lumber woods. It clearly appeared from the evidence and findings that the so-called "lumberjacks" had no residence, home, or domicile at the camp where they

were employed to work for the lumbering season. The evidence and findings showed that they regarded their employment temporary, and it was held that they could not gain a residence by simply being in the camp for a temporary purpose merely. The case is therefore distinguishable from the instant case.

Counsel also relies on *Seibold v. Wahl,* 164 Wis. 82, 159 N. W. 546, where the statutory rules, sub. 2, 3, 4, 5, and 9 of sec. 6.51, Stats., for determining the qualifications of electors are set out and applied to the facts in that case. The decision in that case is in harmony with the holding of the court below upon the evidence introduced in the instant case. At page 86 of 164 Wis. the court said:

"Applying, therefore, the standard of the statutory requirements with the aid of the light from the foregoing decisions, we find in the case at bar a student who registers from Camp Douglas, where his parents reside and to which place he returns as opportunity, his vacations, permit, and who is dependent, in part at least, upon that home for his support. His attending the university, therefore, is clearly for a 'temporary purpose merely,' under the fourth subdivision of sec. 6.51. All the facts are much more consistent with Camp Douglas being his home within the meaning of subdivisions second and third of the statute than with Madison being such home."

See, also, concurring opinion of WINSLOW, C. J., p. 87.

The findings of the court below are supported by the evidence, and under the statute and decisions of this court the judgment below is right and must be affirmed. Sec. 6.51, Stats.; *Miller v. Sovereign Camp W. O. W.* 140 Wis. 505, 122 N. W. 1126; *Seibold v. Wahl,* 164 Wis. 82, 159 N. W. 546; *Asbahr v. Wahl,* 164 Wis. 89, 159 N. W. 549; *Gross v. Wahl,* 164 Wis. 91, 159 N. W. 549.

By the Court.—The judgment is affirmed.

OWEN, J., dissents.

KUHL, Plaintiff in error, vs. THE STATE, Defendant in error.

May 4—May 21, 1918.

Homicide: Reasonable doubt: New trial: Duty of trial judge.

1. A conviction of manslaughter in the fourth degree, of a man charged with murder of his wife, is reversed and a new trial granted on the ground that there was plainly, on the evidence, a reasonable doubt as to his guilt.
2. Where, upon the evidence in such case, the trial judge expected an acquittal, thought it was as likely that the wife's death resulted from her being knocked down twice by a bull as that it was caused by a blow or blows from the husband, and, if he had been upon the jury, "could not conscientiously have found the defendant guilty," it was his duty to set aside the verdict.

ERROR to review a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Christine Kuhl, wife of plaintiff in error, died Friday, August 27, 1915, having been unconscious from 9 o'clock in the evening of Wednesday, August 25th. The plaintiff in error, her husband, was charged with the murder of his wife, and upon the trial a verdict of guilty of manslaughter in the fourth degree was returned. The motion for a new trial was denied and the defendant, plaintiff in error, sentenced to two years in the state prison, and brings such judgment here for review.

For the plaintiff in error there was a brief by *Gardner & Gardner* and *J. W. Murphy* of Platteville, and oral argument by *Mr. Daniel Gardner, Jr.*, and *Mr. Murphy.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

ESCHWEILER, J. The deceased was pregnant at the time of her death. The testimony disclosed that at a post-mortem

examination the physicians discovered, upon removing the upper part of the skull, that the left temporal muscle showed evidence of having been injured by violence and on the opposite side of the skull a hemorrhage had taken place, and that this, in their opinion, was caused by external force or violence and was the cause of her death. These physicians were not asked and did not testify as to whether the indications discovered by them disclosed in any way the nature of the blow, if such it was, that produced the injury causing the fatal hemorrhage. There was a small discolored area on the right hip, a larger area on the left hip, and a small one between her shoulders, but no other external signs of injury.

The testimony of members of the family showed that the deceased, about 9 o'clock on Wednesday evening, got up out of her bed and asked her husband to open the door as she felt she must vomit; that she went to the front door and there fell over outside the house; that her husband and his brother picked her up and laid her on the floor upon quilts or comforters arranged for that purpose by the husband; that she remained there during the night and part of the next day; that a physician was called in the afternoon of Thursday and a nurse was in attendance from this on until the death on Friday; that a premature birth occurred after the arrival of the physician and during her unconsciousness, which continued from Wednesday night.

The state contends that the evidence supports the theory that sometime during the afternoon or early evening of Wednesday the defendant quarreled with his wife and during such quarrel he struck her, causing the injury to her head, the hemorrhage, and consequent death. A witness for the state testified that while he was some 900 feet away from the Kuhl house at about 7 o'clock, he heard a long scream from a woman and then a man swearing; that the sounds were coming right from *Kuhl's* barnyard; that it sounded, as he expressed it, "an awful lot like *Kuhl's* voice." There was

testimony tending to show that the defendant admitted to several that he had difficulties with his wife that evening. No one, however, testified to anything in the nature of an admission made by the defendant that he had struck her on that occasion or caused her injury. Evidence was received of former difficulties between *Kuhl* and his wife and that at one time he pleaded guilty to a charge of assault and battery on her.

The defendant in testifying denied any assault or injury to his wife; and his own and the testimony of a son, eleven years of age at the time of the occurrence, was to the effect that the deceased had stated on the Wednesday evening that while driving the cows from the pasture that afternoon she had been struck by a dehorned Holstein bull kept by the defendant on the farm. The son testified of coming home on the evening in question and finding his mother, father, and little sister milking, that his mother's dress was torn and dusty and her face looked flushed, and that she was not as usual, and that she said the bull had hooked her.

There are some apparent discrepancies in various statements made by the defendant as well as the boy as to these occurrences and as to the statements by the mother.

A physician called as a witness by the defendant, in answer to a hypothetical question which included the facts testified to by the physicians who had made the examination of the body of the deceased, and the theory of the defendant that the injury had been caused by deceased being knocked to the ground by the bull, stated that in his opinion she probably received a blow on the left hip which knocked her down, abrasing her right elbow and right hip, and that then another blow was received on the left side of the head which would account for the hemorrhage; and that the further circumstances embraced in the question and appearing from the testimony of the members of the family of her assisting in milking, in preparing the supper, and other household duties be-

fore she became unconscious on the Wednesday evening, all could naturally have occurred upon the theory of being injured by the bull and account for her subsequent condition and death. No other or further testimony was offered by the state than what has been mentioned above with reference to the probable nature of the injury.

The impression that this entire evidence made upon the trial court can be best shown by the following extracts from his decision on a motion for a new trial:

"Upon the entire evidence in the case and the law given to the jury, I expected a verdict of acquittal. I have very thoroughly considered this motion for a new trial and the case as a whole. The serious doubt I had as to the justice of this verdict when it was rendered is still with me, and I have puzzled over the question of what action I should take upon this motion. It seemed to me upon the trial that there was another hypothesis arising from the evidence to account for the death of Mrs. Kuhl other than that her husband caused her death. I thought that it was as likely that her death was caused by being knocked down twice by a bull as that it was caused by a blow or blows from the husband which left no external marks whatever; that the one was as probable as the other." . . .

"It is evident to me now, in view of what the testimony developed as to the cause of death, that probable injury was done to the defendant by the wide latitude the court permitted in the introduction of evidence against the defendant." . . .

"If I had been upon the jury I could not conscientiously have found the defendant guilty. I recognize that the jury were the sole judges of the weight of the testimony and that if a conviction can stand at all upon the testimony in this case I would not grant a new trial; and it is my opinion now that I ought not to do so, because in view of the feeling this case has caused, it is my judgment that the proper course to be pursued is for me to refuse to grant the motion for a new trial, so that this case can be taken by writ of error to the supreme court and the opinion of that court taken upon whether the testimony will sustain the conviction. If that

court should so determine, I can conscientiously sentence the defendant. If they should find that my view that the testimony did not warrant the verdict should be sustained, then there would be a vindication of the defendant from this serious charge, and the county would not be put to further cost in this case, as it would be if a new trial were granted."

Without going further into the details of this unfortunate affair, we are satisfied from a consideration of this record before us that there is a robust reasonable doubt plainly standing out in this record as to the guilt of the defendant and it is such that our consciences cannot approve of a conviction founded upon such testimony.

Where the evidence on a trial produces the impression upon the trial court such as it did in this case, it becomes his duty under the law of this state to set such a verdict aside. *B—— v. State,* 166 Wis. 525, 166 N. W. 32.

With the impression that the evidence in this record makes upon us, we can pursue no other course than to direct the court below, as we now do, to set aside the verdict and give a new trial. *Koscak v. State,* 160 Wis. 255, 269, 152 N. W. 181; *Abaly v. State,* 163 Wis. 609, 613, 158 N. W. 308.

By the Court.—Judgment reversed, and the cause remanded with directions to set aside the verdict and grant a new trial.

OWEN, J., took no part.

ROOHANA, Plaintiff in error, vs. THE STATE, Defendant in error.

May 4—May 21, 1918.

Homicide: Degrees: Assault and battery not one: Manslaughter.

1. Under our statutes there is no lower degree of homicide than manslaughter in the fourth degree; and on a trial for any degree of homicide the defendant cannot be convicted of assault and battery.
2. Where the death of a person was caused by a blow struck in an unlawful assault upon him, the assailant is guilty, at least, of manslaughter.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

Plaintiff in error was convicted of manslaughter in the fourth degree. The evidence shows that on the 26th day of September, 1915, in the city of Milwaukee, without provocation, plaintiff in error struck one James C. Davis across the face with the flat of his hand; that Davis immediately fell on the sidewalk, unconscious; that he was placed in an ambulance, taken to the hospital, and was dead upon his arrival there. Deceased's skull had been trephined a number of years before, and the region from which the bone had been removed by this operation was filled in with tough connecting tissue, to which was adherent a corresponding area of brain tissue. The doctor who performed the autopsy testified that this brain tissue had been torn away from the left hemisphere of the brain—torn out of the brain substance of the left hemisphere which corresponded in size to that of the bone defect. In the opinion of the doctor the cause of the tearing away of the brain tissue was a sudden motion of the yielding substance of the brain within the rigid container. The tissue which had supplanted and taken the place of the bone tore, as the result of the application of force, a certain propulsion of the skull which the brain could not follow, or a sudden in-

terference with the motion of the skull to which the brain could not adapt itself. The doctor testified that the force was the result of either a blow or a fall.

The defense was that the blow inflicted by the plaintiff in error was not of sufficient force to produce the resulting death of the deceased, nor was it sufficient to knock him down; that the deceased must have fallen to the sidewalk from some cause unknown, and that the impact of his head upon the sidewalk caused the brain disturbance which resulted in his death.

From a judgment of conviction of manslaughter in the fourth degree plaintiff in error brings this writ of error.

For the plaintiff in error there was a brief by *Rubin, Fawcett & Dutcher,* attorneys, and *W. B. Rubin* and *A. W. Richter,* of counsel, all of Milwaukee, and oral argument by *Mr. Richter.*

For the defendant in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *Arthur H. Bartelt,* assistant district attorney, and oral argument by *Mr. Bartelt.*

OWEN, J. The reason urged for setting aside the conviction of plaintiff in error and for a reversal of the judgment is the refusal of the trial court to charge the jury that they might find the defendant guilty of assault and battery, claiming that assault and battery, under the circumstances of this case, is a lesser degree of the offense of homicide, and that the jury should have been accorded the opportunity of finding the defendant guilty of such lesser offense. The suggestion that the jury might have so found is supported by the circumstance that, after the jury had deliberated for some time, they returned into court and the foreman inquired of the court whether the jury could find the defendant (plaintiff in error) guilty of assault and battery. The court stated that the jury could not find him guilty of that offense, and

that they would have to determine whether the defendant was guilty of manslaughter in the fourth degree. The jury did find him guilty of manslaughter in the fourth degree, but recommended the exercise of the utmost leniency in the pronouncement of the sentence.

A reference to the statute law of this state effectually disposes of the contention made by the plaintiff in error. Secs. 4337 to 4362, inclusive, of the Statutes define the various degrees of homicide, consisting of three degrees of murder and four degrees of manslaughter. Immediately following these sections, dealing specifically with the various degrees of homicide, and as a sort of omnibus provision, evidently intended to comprehend every unjustifiable and inexcusable act on the part of one resulting in the death of another, comes sec. 4363, which provides:

"Every other killing of a human being by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in this chapter murder or manslaughter of some other degree, shall be deemed manslaughter in the fourth degree."

Sec. 4365 provides:

"The killing of a human being by the act, procurement or omission of another in cases where such killing shall not be murder according to the provisions of this chapter is either justifiable or excusable homicide or manslaughter."

It is entirely plain from these statutory provisions that when the act, procurement, or culpable negligence of one results in the death of another, the moving party is guilty of at least manslaughter in the fourth degree. There may be excusable and justifiable homicides, but that is not the defense here. It is not contended that the killing was either justifiable or excusable. The contention rather is that death did not result from the act, procurement, or culpable negligence of plaintiff in error, and that he therefore is not guilty of the crime of which he was convicted. The verdict of the jury,

however, based upon sufficient evidence, establishes the fact that Davis did come to his death by reason of the blow inflicted by plaintiff in error. The fact that the jury might or would have found the plaintiff in error guilty of assault and battery merely, if accorded an opportunity to do so, is immaterial. When they were made to understand that they must find the defendant guilty of manslaughter in the fourth degree or acquit him, they found him guilty of such offense. Upon the state of the evidence in this case it must, therefore, be regarded as an established fact that the deceased came to his death by reason of the unlawful assault committed upon him by the accused. Sec. 4363 above quoted stamps such act as manslaughter in the fourth degree and recognizes no lesser element of the crime.

But there is another section of the statutes important to be considered in this connection, which would seem to foreclose every reasonable doubt of a legislative purpose to constitute manslaughter in the fourth degree the ground floor of homicide offenses, and further confirms the guilt of plaintiff in error of such crime. Sec. 4346 provides:

"The killing of a human being, without a design to effect death, by the act, procurement or culpable negligence of any other, while such other is engaged in the perpetration of any crime or misdemeanor not amounting to a felony, or in an attempt to perpetrate any such crime or misdemeanor, in cases where such killing would be murder at the common law, shall be deemed manslaughter in the first degree."

There is no pretense that the assault made by plaintiff in error upon deceased was excusable or justifiable. It is conceded that it was unlawful. The assault being unlawful and resulting, as the jury found, in the death of the person assaulted, the crime of manslaughter necessarily follows by force of sec. 4346 as well as sec. 4363.

The suggestion here made that a person on trial for any degree of homicide may be convicted of assault and battery,

is not a hackneyed one. Indeed, we believe it to be rather original. Notwithstanding the brief presented in behalf of plaintiff in error bears evidence of the diligence of counsel, no authority has been cited supporting the contention, except decisions in the state of Texas, which were founded on a statute of that state providing that under certain circumstances a person causing the death of another may be prosecuted for and convicted of any grade of assault and battery. If judicial authority exists for the contention made here under statutory law similar to that of this state, it is as meager and obscure as we believe it to be fallacious.

By the Court.—Judgment affirmed.

STATE, Respondent, vs. SCHOLL, Appellant.
STATE, Respondent, vs. POLLAND, Appellant.

May 4—May 21, 1918.

Juvenile courts: Proceedings not criminal: Constitutional law: Trial by jury: Due process of law: Unsworn testimony: Jurisdiction: Designation of judge.

1. Proceedings under the juvenile court law are in no sense criminal proceedings, nor is the result in any case a conviction or punishment for crime. They are simply investigations by the state into conditions which if unchecked may lead to the making of its children into criminals instead of law-abiding citizens. The constitutional guaranty of trial by jury is therefore inapplicable.
2. The constitutional requirement of "due process of law" does not prevent in such proceedings the use of investigation and unsworn testimony in ascertaining the essential facts. [It may be advisable, however, in a case where it seems best to take the child permanently from its parents and consign it to the care of an institution, that sworn testimony be taken and the essential facts be thus proven before the final order is made, in order to avoid any question as to the validity of such order.]
3. The so-called "juvenile court" is not in fact a separate and in-

dependent court, but is rather a jurisdiction which is to be exercised in his court for a stated period by a judge selected by and from the judges of the courts of record in the county.

4. The power thus given to the judges of a county to designate one of their number to exercise such jurisdiction is an administrative duty which may properly be imposed upon them.

APPEALS from a judgment of the county court of Milwaukee county: J. C. KAREL, Judge. *Affirmed.*

The acting judge of the juvenile court of Milwaukee county placed *Herman Scholl* and *Max Polland,* boys ten and eleven years of age respectively, in charge of the probation officer of the court as delinquents, under the provisions of the juvenile court law, and an appeal was taken by each.

The chief contention of the appellants is that the juvenile court law is unconstitutional because it denies a jury trial and authorizes conviction of crime without due process of law, and perhaps for other reasons. In order that this question may be understood it will be necessary to state the substance of the law, the same being found in sec. 573—1 to 573—10 inclusive of the Statutes. Sec. 573—1 defines dependent, neglected, and delinquent children for the purposes of the act. It is only necessary here to insert the definition of a delinquent child, which is as follows:

"2. The words 'delinquent child' shall include any girl under the age of eighteen years and any boy under the age of seventeen years, who violates any law of this state, the penalty for which is not imprisonment in the state prison, or who violates any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly patronizes any place where any gaming device is or shall be operated; or who knowingly visits, or enters a house of ill repute; or who patronizes, visits or enters any stall saloon, or wine room, or any saloon frequented by men or women of bad repute; or who attends, visits or enters any dance held in any room or hall in connection with a saloon, unless accompanied by parents or legal guardian; or who loafs or congregates with groups or gangs of other

boys at or about any railroad yard or tracks; or who habitually uses obscene, vulgar or profane language, or is guilty of immoral conduct in any public place, or about any schoolhouse; or who is habitually truant or habitually insubordinate in any school."

Sec. 573—2 provides (1) for the designation in each county by the judges of the several courts of record in such county, at intervals not exceeding one year, of one or more of their number to hear all cases coming under the act; (2) that the findings of the court shall be entered in a record book and the court called for convenience the "juvenile court" or the "juvenile branch of the court," the clerk and the stenographer of the court of which the judge is a member being the clerk and stenographer respectively of the "juvenile court" (with certain exceptions not material here), all courts of record in the state being given concurrent jurisdiction with the circuit courts in all cases coming under the act; (3) for the appointment, compensation, and removal of probation officers, there being a chief probation officer provided for in counties having a population of 150,000; (4) for the trial of cases under the act by a jury of six on demand of any person interested, or on the judge's own motion.

Subsequent sections provide for (5) the duties and powers of probation officers, among which are "to make such investigations as may be required by the court; to be present in court in order to represent the interests of the child, when the case is heard; to furnish the court such information and assistance as the judge may require, and to take such charge of any child before and after trial as may be directed by the court;" (6) for the commencement of proceedings in any case of a neglected, dependent, or delinquent child by the filing of a verified petition setting forth the facts, signed by a reputable resident of the county; (7) for the issuance of a summons to the person having custody of the child, and its parents, requiring them to appear with the child, and for the hearing and disposal of the matter upon the return of the

summons with the child in a summary manner; (8) for the commitment of a child under sixteen years old found to be dependent or neglected to the care and custody of some state or county institution as provided by law, or to some incorporated association organized for the purpose of receiving such children, also for the temporary care and custody of such child in the care of the probation officer or some suitable person or institution for a period not exceeding one year; (9) for the commitment of a child found to be delinquent to the care of a duly appointed probation officer, allowing the child to remain at home subject to visitation by and regular report to the probation officer, and to return to the court for further proceedings on the original petition if necessary. Other provisions are made so that delinquent children may be placed in a family, home, or institution, or boarded out in a home, or committed to an industrial school or institution.

It appears by the record returned that a police officer, after investigation by himself and Probation Officer Killey, made a verified complaint in the present case and presented the same to the juvenile court, County Judge JOHN C. KAREL presiding, charging that eighteen boys (including the boys in question), ranging in age from ten to fourteen years, during October and November, 1917, loitered about the yards of the Chicago, Milwaukee & St. Paul Railway in Milwaukee, jumped on and off moving freight trains, and were incorrigible, and prayed that the court inquire into the delinquency of the boys; that the parents of the children were summoned and a hearing was had before Judge KAREL November 23, 1917, all the boys being present, and a number of the parents, among them the father of the appellant *Scholl;* that the probation officer, who had investigated the matter, was present, and stated that the boys individually and collectively had confessed to him that they were frequently about the railroad tracks; and that a number of the boys were already in probation and under his care for former de-

linquencies. No sworn testimony was taken, and no question seems to have been raised as to the main fact, namely, that the boys frequented the railroad yard and cars, except that the appellant *Scholl* denied that he frequented the railroad tracks and claimed that he was only at the foot of a slight elevation adjoining the tracks on one occasion and was helping his friend *Polland* pick up coal which rolled down the hill from the cars. Two other boys, however, stated that they were on a freight car throwing off coal, and that *Scholl* and *Polland* were picking it up.

The result of the hearing was that the boys were placed on probation under Mr. Killey. Some were detained at the detention home for a few days, but the appellants *Scholl* and *Polland* were simply placed under probation and allowed to go home.

For the appellants there was a brief by *Joseph G. Hirschberg,* attorney, and *Horace B. Walmsley,* of counsel, both of Milwaukee, and oral argument by *Mr. Hirschberg.*

For the respondent there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *F. F. Groelle,* assistant district attorney, and oral argument by *Mr. Groelle.*

WINSLOW, C. J. A democracy cannot long exist unless the great body of its voters be not merely intelligent, but moral. The children of today are the voters of tomorrow. It is the greatest concern of the State, therefore, that its children be preserved from vicious habits, for the vicious child is the father of the vicious man.

The law before us may be said to be founded on these propositions.

Its aim is to keep something like a parental watch over children who are neglected or wayward or both, and hence are subject to vicious influences; to bring them and their parents or guardians before an experienced and humane

judge who shall inquire into the situation, not with the awe-inspiring and frigid methods of a criminal court, but informally and intimately, like a wise and gentle elder brother, or like the good Samaritan of holy writ, and who shall, when fully advised, do that which is best for the child's future, either by way of sending it to an institution or by providing for kind and tactful but in no sense degrading surveillance for a limited time at home.

It would be a public misfortune to set aside a law so designed even though it were not perfect in its details. Only the most weighty and convincing considerations could justify such action, and we do not think they exist here.

The serious claims made will be briefly considered. It is said the constitutional guaranties of trial by jury and due process of law are denied and in this connection reliance is placed on *Robinson v. Wayne Circuit Judges,* 151 Mich. 315, 115 N. W. 682.

It is sufficient to say on this point that the proceedings under this law are in no sense criminal proceedings, nor is the result in any case a conviction or punishment for crime. They are simply statutory proceedings by which the state, in the legitimate exercise of its police power, or, in other words, its right to preserve its own integrity and future existence, reaches out its arm in a kindly way and provides for the protection of its children from parental neglect or from vicious influences and surroundings, either by keeping watch over the child while in its natural home, or, where that seems impracticable, by placing it in an institution designed for the purpose.

In the *Robinson Case* the law provided for fine and imprisonment in case of a finding of delinquency, and the Michigan court held the law invalid because it provided for the trial of criminal actions before a jury of six. In all other respects the law there in question (which in its essentials was quite similar to the law in question here) was fully sustained.

MERKEL, Plaintiff in error, vs. THE STATE, Defendant in error.

May 4—May 21, 1918.

Fraudulent issuance of bank check: When offense complete: Evidence: Copies of bank-book entries.

1. The offense made punishable by sec. 4438*a*, Stats. 1917 (Laws 1917, ch. 164), is complete when, with knowledge of an insufficiency of funds or credit as there stated, a bank check is made, drawn, or uttered with intent to defraud. The provision in sub. 2 of said section relating to nonpayment by the maker or drawer within five days after notice of the drawee's refusal to pay, is a rule of evidence only.
2. In a prosecution under sec. 4438*a*, Stats. 1917, copies of bank-book entries, duly verified as provided in sec. 4189*b*, were properly admitted in evidence.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

Henry S. Sloan of Milwaukee, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *Arthur H. Bartelt,* assistant district attorney, and oral argument by *Mr. Bartelt.*

KERWIN, J. Plaintiff in error, hereinafter called defendant, was convicted of fraudulently issuing a check and has brought the record here for review upon writ of error.

Following is the statute upon which defendant was prosecuted and convicted:

"Section 4438*a*. 1. Any person who, with intent to defraud, shall make or draw, or utter or deliver, any checks, drafts, or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or credit with, such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of a misdemeanor

and punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both fine and imprisonment.

"2. As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be *prima facie* evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee.

"3. The word 'credit' as used herein, shall be construed to mean an arrangement or understanding with the bank or depository, for the payment of such check, draft or order."

Counsel for defendant contends that the provision in sub. 2 of the above statute respecting payment of the check, draft, or order within five days after receiving notice that such paper has not been paid by the drawee is an essential element of the offense. In this contention counsel is in error. Under the former statute, before amended, the offense was not complete until the paper had been presented and remained unpaid for five days after it became payable, while under the present statute the offense is complete when the paper is made, drawn, or uttered with intent to defraud. Manifestly sub. 2 of the present statute is a rule of evidence.

Sec. 4438*a*, before amendment by ch. 164, Laws 1917, provided:

"Any person who shall make, sign, utter and deliver an instrument in writing commonly known as a bank check, with intent to defraud, without having money on deposit where such check is made payable, shall, if such check is presented and remains unpaid for five days after it becomes payable and payment thereof is refused because the maker has no funds on deposit with which to pay such check, be punished by fine of not more than one hundred dollars or by imprisonment in the county jail not more than one year."

In the instant case the defendant did not testify or produce any evidence, and it sufficiently appears from the record that the check was issued and not paid at the time of the arrest, which was seventeen days after the issuance of the check and more than five days after notice, so that under sub. 2 above referred to a *prima facie* case was made of intent to defraud and knowledge on the part of the defendant of insufficiency of funds or credit with the bank.

The evidence also sufficiently shows *prima facie* that the check was given for meats sold to the defendant and that at least some of the goods sold on the faith of the check were delivered at the time the check was given. In the absence of any evidence on the part of the defendant we are satisfied that a *prima facie* case was made.

It is also insisted by counsel for defendant that error was committed in the admission of evidence. The state offered copies of certain bank-book records and it is contended that the original books should have been produced. Sec. 4189*b*, Stats., provides:

"Whenever any evidence shall be required in any court or before any officer from the books of any bank or banker doing business at the time any action or proceeding is ready for trial or hearing, copies of entries therein, when verified by the affidavit or the testimony of an officer of the bank, stating that the book is one of the ordinary books of the bank used in the transaction of its business, that the entry copied was originally made therein at the time of its date and in the usual course of the business of the bank, that there are no interlineations or erasures, that the book is in the custody or control of the bank, that the copy has been compared with the book and is a correct copy of the entries made therein, shall be *prima facie* evidence in all legal proceedings of such entry or entries; . . ."

The copies offered were properly verified by the testimony of an officer of the bank so as to make such copies competent under the statute, therefore there was no error in admitting the evidence. We find no prejudicial error in the record.

By the Court.—The judgment is affirmed.

NELSON, Plaintiff in error, vs. THE STATE, Defendant in error.

May 4—May 21, 1918.

Public health: Tenement houses: Requirement as to basement rooms: Constitutional law: Retroactive statute: Police power: Property rights: Remodeling of buildings: Reasonableness of regulations.

1. Sec. 1636—195, Stats. 1915 (providing that in cities of the first class "no room in the cellar or basement of any apartment, tenement, lodging or boarding house shall be . . . occupied for living purposes unless" certain conditions as to height of ceiling from floor and above level of the lot, window openings, etc., are complied with), applies to buildings existing when the law was enacted in 1909, but is not for that reason retroactive, since it operated only upon conditions existing after it went into effect.
2. Such a law is a valid exercise of the police power to prescribe reasonable regulations for the preservation of the public health, even though it may affect property rights by requiring the remodeling of basement tenements, notice to owners and a reasonable time for compliance being provided for.
3. Determination of what is reasonable in such a case is generally a legislative function the exercise of which will not be interfered with by the courts unless clearly exceeding the bounds of reason.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

Plaintiff in error was convicted of violating the provisions of sec. 1636—195, Stats. 1915, which forms a part of ch. 394 of the Laws of 1909, being the tenement house act, applicable to cities of the first class. The section reads:

"No room in the cellar or basement of any apartment, tenement, lodging or boarding house shall be constructed, altered or occupied for living purposes unless all of the following conditions are complied with: Such rooms shall be at least eight feet high in every part from the floor to the ceiling; the ceiling of such room shall be at least four feet above the level of the lot; such room shall have a window or win-

dows opening upon the street, yard or outer court and the total window area shall be at least one tenth the superficial floor area of the room; one half of sash of such window shall be made to open the full width; the walls and floor of such room shall be dampproof and waterproof, and fit for human habitation as determined by the departments charged with the enforcement of sections 1636—180 to 1636—201, inclusive."

Plaintiff in error contends that the law is unconstitutional in so far as it is construed to apply to him, because the evidence shows that his building was in existence at the time of the passage of the act and has remained unchanged ever since; that the act was intended to apply only to buildings constructed or remodeled after its passage and not to existing buildings; that if applicable to such it is unconstitutional because retroactive and unreasonable.

For the plaintiff in error there was a brief by *Joseph A. Padway,* attorney, and *A. W. Richter,* of counsel, both of Milwaukee, and oral argument by *Mr. Richter.*

For the defendant in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *Arthur H. Bartelt,* assistant district attorney, and oral argument by *Mr. Bartelt.*

VINJE, J. It appears from the evidence that plaintiff in error was the owner of a tenement house in Milwaukee with basement rooms used for living purposes that did not comply with the requirements of the section quoted in the statement of facts because their ceilings were not four feet above the level of the lot. It also appears that pursuant to sec. 1636—200, Stats., plaintiff in error was duly notified that his basement rooms constituted a nuisance and he was given a reasonable time in which to make them comply with the law. He declared his intention to do so by raising the building, and secured an extension of time within which to raise it to June 1, 1915. He failed to abate the nuisance, and on December 4th following the complaint in this case was made.

He claims the law is unconstitutional in so far as it is construed to apply to buildings in existence at the time of the passage of the law because it is retroactive. It is admitted on behalf of the state that his building was constructed long before the law was enacted in 1909, but it claims the law applies to his building and that it is reasonable and not void even though it contains retroactive features. We are unable to discover any retroactive features in the law. It took effect from and after its passage and publication, June 15, 1909. It operated only upon conditions existing after it went into effect. It did not make conditions existing previous thereto unlawful. It did not make them unlawful as of a time when they were lawful. It only prescribed what conditions should be deemed lawful after it went into effect, and it operated alike upon buildings existing and those to be erected in the future. Only by so doing could it adequately effectuate its purpose. If it acted only upon buildings to be constructed in the future, a part of the evil sought to be remedied would endure for generations, for buildings last a long time if kept in a proper state of repair. So it is clear both from the language and the purpose of the act that it applies to existing buildings.

When it is borne in mind that there is a consensus of opinion not only among the medical profession but also among people generally that insufficient light and air and dampness are deleterious to health, it is apparent that the provisions of the law which aim to prevent such conditions are reasonable. It is well within the police power to prescribe reasonable regulations for the preservation of the public health. *State v. Redmon,* 134 Wis. 89, 114 N. W. 137; *Benz v. Kremer,* 142 Wis. 1, 125 N. W. 99; *Mehlos v. Milwaukee,* 156 Wis. 591, 146 N. W. 882, and cases there cited. And a determination of what is reasonable is generally a legislative function the exercise of which will not be interfered with by the courts unless clearly exceeding the bounds of reason. *Benz v. Kremer, supra.* And where such exercise is within the

bounds of reason the fact that property rights may be affected does not invalidate the law. *Ibid.* The present law may require the remodeling of basement tenements, but it does so in the interest of public health, and it seeks to render them more habitable and therefore more desirable so that the necessary expenditure of remodeling may be in part if not wholly recouped. But be that as it may, the power to require the remodeling in the interests of public health is unquestioned even if done at some financial loss.

The law provides for notice to those coming under it and a reasonable time is given them to comply with its wholesome provisions. It is therefore neither unreasonable in what it requires done nor in the manner in which it must be done. It follows that the law is a valid exercise of police power and that the plaintiff in error was lawfully convicted and sentenced.

By the Court.—Judgment affirmed.

SULLIVAN, Administrator, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT SAINTE MARIE RAILWAY COMPANY, Appellant.

March 6—June 19, 1918.

Master and servant: Injury to brakeman: Defective handhold on car: Evidence: Sufficiency: Interstate commerce: Federal statutes: Proximate cause: Appeal: Review: Motion for new trial, when unnecessary: Expert testimony: Hypothetical questions: Assuming facts: Province of jury: Opinion as to cause of death: Damages: Competency of evidence: Special verdict: Instructions to jury: Burden of proof.

1. In an action for the death of a brakeman, although there was no eye-witness of the accident, the evidence is *held* to sustain findings by the jury that he was injured by a fall from defendant's freight car caused by the giving way of a defective handhold, and that his death was caused in whole or in part by the injuries so sustained.
2. Errors committed by the trial court, such as the improper admis-

sion of testimony, may be reviewed on appeal from the judgment although there was no motion for a new trial, such motion being necessary only to preserve for review errors committed by the jury.

3. A party has the right to the opinion of an expert witness on the facts of the case as he claims them to be, and may propound hypothetical questions assuming as proved all facts which the evidence tends to prove.
4. Notwithstanding the general rule that an expert witness should not be permitted to give his opinion upon the ultimate fact to be found by the jury, when such ultimate fact is a scientific question, as whether or not the death of a person was the result of a fall which he sustained, the opinion of an expert may be given without invading the province of the jury.
5. In an action for the loss to his mother resulting from a brakeman's death, a sister of the deceased was properly permitted to testify that he had expressed his intention and purpose of remaining single and not marrying.
6. In an action for the death of a brakeman who was injured by reason of the giving way of a defective handhold on a freight car in interstate commerce, such action being governed by the federal safety appliance and employers' liability acts, a question submitted in the special verdict as to whether his death was "caused in whole or in part by the injuries so sustained by him" is *held* preferable in form to a question proposed by defendant, "Was the death . . . caused by any injury suffered at the time . . . or was it caused by disease?"
7. An instruction as to direct and remote cause, in connection with the question submitted as above stated, was not necessary and would have been out of place, proximate cause having nothing to do with liability under the federal acts.
8. If elucidation of a question in a special verdict is deemed necessary by counsel, they should submit a request therefor.
9. Where the charge to the jury states that the burden of proof is upon the plaintiff and that it is incumbent upon him to establish the fact, as he claims it to be, to the satisfaction of the jury by a preponderance of the credible evidence in the case, the court need not add that the jury should be satisfied "to a reasonable certainty," that phrase being mere surplusage when used in such connection.

APPEAL from a judgment of the circuit court for Douglas county: E. B. BELDEN, Judge. *Affirmed.*

This action was brought by the administrator of the estate

of Bernard M. Conway, deceased, to recover damages for personal injuries sustained by said deceased while in the employ of the defendant as a brakeman in its yards in the city of Superior on the 20th day of March, 1916, and for the loss resulting to Bridget Conway, his mother, on account of his death resulting from the accident. The case was tried before a jury and the following special verdict returned:

"(1) Was the deceased, Bernard M. Conway, injured by falling from defendant's car? *A.* Yes.

"(2) If you answer the first question 'Yes,' then answer this: Was such fall caused in whole or in part by the grab iron in question giving way? *A.* Yes.

"(3) Was the grab iron in question defective at the time in question? *A.* Yes.

"(4) If you answer the first, second, and third questions 'Yes,' then answer this: Did the fact that such grab iron was defective contribute in whole or in part to cause Conway's injuries complained of? *A.* Yes.

"(5) If you answer the fourth question 'Yes,' then answer this: Was Conway's death caused in whole or in part by the injuries so sustained by him? *A.* Yes.

"(6) Did any want of ordinary care on the part of Conway proximately contribute to cause his injuries and death? *A.* No.

"(7) What sum of money will reasonably compensate Bridget Conway, mother of Bernard M. Conway, for her pecuniary loss sustained by his death? *A.* $2,000.

"(8) What sum of money will be reasonable compensation for the physical and mental pain and suffering endured by Conway from the time of his injury, if he was so injured, to the time of his death, as the result of such injury? *A.* $1,500."

From a judgment rendered in favor of the plaintiff on such special verdict the defendant appealed.

For the appellant there was a brief by *Luse, Powell & Luse* of Superior, attorneys, and *A. H. Bright* and *J. L. Erdall* of Minneapolis, Minnesota, of counsel, and oral argument by *L. K. Luse.*

W. P. Crawford of Superior, for the respondent.

The following opinion was filed April 3, 1918:

OWEN, J. The defendant moved to direct a verdict in favor of the defendant; for judgment notwithstanding the verdict; to change the answer "Yes" to the first question of the special verdict to "No;" to change the answer "Yes" to the fourth question of the special verdict to the answer "No;" and the answer "Yes" to the fifth question of the special verdict to the answer "No." At all times the appellant has maintained that the evidence was not sufficient to sustain the verdict or a judgment in favor of the plaintiff, and that the plaintiff utterly failed to make out a case against the appellant. This calls for a brief review of the evidence to determine whether the verdict has any support therein.

It appears that the deceased was a brakeman in the employ of the defendant. At about 2 o'clock a. m. March 20, 1916, he was assisting in taking a drag of cars from the defendant's Belknap yard in the city of Superior to the South Shore Railway Company's yard in the same city. He was the rear brakeman on this drag of cars. It was passing from a lead or switch track to the main-line track. There were eight or nine cars in the drag. It was the duty of the deceased to close the switch after the cars had passed onto the main track. While the cars were passing over the switch Conway (or his lantern, as it was dark) was seen on top of the cars near the rear end of the drag. He would naturally be in this locality at the time in order to descend from the rear car and close the switch when the drag had passed over and onto the main track. Suddenly his lantern was seen to go out, and nothing more was seen or heard of Conway until about ten minutes later, when he climbed into the engine of a rear drag of cars following along behind the one on which he was working, with his unlighted lantern in one hand and a handhold or ladder round in the other. He was very pale and

in a dazed and semi-conscious condition, but with no scratch, bruise, scar, or other external evidence of injury upon him. No evidence was given as to what he said. He "crumbled up" and was assisted upon the fireman's seat box. He was rubbing his right leg and appeared weak and somewhat faint—not a dead faint. He was taken by this engine to the depot, where he was carried to an ambulance and taken to the hospital.

Appellant concedes that the evidence showed that a handhold in the ladder upon C. P. car No. 89652 was broken off about half way up on the car and that this handhold was the one which Conway had in his hand when he came into the cab of the engine. It is also conceded that this car was in interstate commerce. There was also evidence that this car was near the rear end, if not the last car, in the drag. There was a fresh break on one side of the ladder round and an old break with rust on the other. When he was taken to the hospital he was suffering from a brain lesion. He remained in the hospital until the 13th day of April. He was not cured or well when discharged from the hospital and was never well again. He was later committed to an insane hospital at Newberry, Michigan, at which institution he died on the 30th day of July, 1916. The cause of his death was given as "paralysis of the insane."

The medical experts who testified in the case agreed that a man may receive an injury on the head from a fall without any exterior marks on his person; that this fall, slight or great, may be sufficient to produce a brain lesion and may result in insanity and death.

It is a very logical inference from the facts proved in this case that a defective ladder round or handhold on C. P. car No. 89652 broke and gave way while Conway was either ascending or descending the car in the performance of his duties, and that as a result thereof Conway fell to the ground and was injured, and that the finding of the jury to the ef-

fect that Conway was injured by falling from defendant's car is not without evidence to support it.

It was the contention of the defendant that the deceased was a victim of syphilis, and that his death was due to syphilis and not to injury. The evidence is quite persuasive that he did have syphilis. But it was not at all conclusive that his death was not due, in whole or in part, to the injuries received by him. It is in evidence that when Conway went to work that night he appeared to be in proper mental and physical condition for the performance of his duties. It appears that he did satisfactorily perform the duties of a brakeman until the exact moment of the happening of this accident, and immediately upon the happening of the accident he became incompetent and incapacitated for work of any kind. Within a very short time after his arrival at the hospital it was determined by the doctor called to attend him (who, by the way, was in the employ of appellant) that he was suffering from a brain lesion. Appellant contends that the brain lesion might have resulted from syphilis. This appears to be true. It might have resulted from syphilis. It is also true that it might have resulted from the injury sustained by him, according to all the medical experts who testified in the case. The question submitted to the jury was whether his death resulted in whole or in part from the injury sustained. That was the question they were called upon to determine. The evidence furnishes some basis for their conclusion that the accident and resulting injury had something to do with his death. We may confess strong suspicions that his syphilitic condition was principally, if not wholly, responsible for his death. We cannot say, however, that there was no evidence in the case from which the jury might find that his death was due either wholly or in part to the accident. We therefore think that the verdict of the jury should not be disturbed, nor should the court have granted appellant's motion for direction of a verdict.

Appellant urges upon our attention various asserted errors of the trial court in the improper admission of testimony offered by the plaintiff. Counsel for respondent vigorously protests that errors committed by the court in this particular cannot now be considered because no motion for a new trial was made in the court below. Counsel is in error. It is the settled law of this state that such errors may be reviewed by this court upon an appeal from the judgment in the absence of a motion for a new trial. *Cotton v. Watkins,* 6 Wis. 629; *Hayward v. Ormsbee,* 11 Wis. 3; *Kirch v. Davies,* 55 Wis. 287, 11 N. W. 689; *Anstedt v. Bentley,* 61 Wis. 629, 21 N. W. 807; *Reed v. Madison,* 85 Wis. 667, 56 N. W. 182. A motion for a new trial is only necessary to preserve for review errors committed by the jury. Errors committed by the court can be reviewed without such motion. *Plankinton v. Gorman,* 93 Wis. 560, 562, 67 N. W. 1128. Perhaps certain language in *Kopplin v. Quade,* 145 Wis. 454, 130 N. W. 511, and *Beebe v. M., St. P. & S. S. M. R. Co.* 137 Wis. 269, 118 N. W. 808, justifies a contrary inference. There was no intention on the part of the court in those cases to disturb the long established law on the subject, and expressions in those opinions tending to cast doubt upon the matter are disapproved.

Certain hypothetical questions were propounded by the respondent to expert witnesses in which it was assumed that deceased had fallen from a car and sustained an injury. Appellant's counsel objected to these questions, contending that it had not been proven in the case that the deceased fell from a car or sustained an injury. We think the objection was properly overruled. A party has the right to the opinion of an expert witness on the facts of the case as he claims them to be, and he may propound hypothetical questions assuming as proved all facts which the evidence in the case tends to prove. *Quinn v. Higgins,* 63 Wis. 664, 24 N. W. 482. It was the plaintiff's theory that the deceased sustained an injury by reason of falling from a box car. The evidence

introduced by the plaintiff, which was before the court at the time the questions were propounded, not only justified such conclusion, but, as we have seen, was sufficient to sustain an affirmative finding of the jury upon that fact. The plaintiff certainly was entitled to the opinion of experts based upon the assumption that such fall and injury had been sustained by the deceased.

Certain hypothetical questions were propounded asking expert witnesses to "state whether or not, in your opinion, his death was the result of the fall which I described in my former question." Objection was made to these questions that they were incompetent and constituted an invasion of the province of the jury. It is a general rule that an expert witness should not be permitted to give his opinion upon the ultimate fact to be found by the jury. It is also another well settled general rule that an expert may give his opinion upon any question within the realm of scientific knowledge. When the ultimate fact to be found by the jury is a scientific question, these two principles necessarily come into collision and one or the other must give way. However, it is unnecessary for us to philosophize upon the question as to which should be given the right of way under the circumstances, because the form of the question here under consideration was expressly sanctioned in *Crouse v. C. & N. W. R. Co.* 102 Wis. 196, 78 N. W. 446, 778.

Error is also assigned because a sister of the deceased was permitted to testify that he had expressed his intention and purpose of remaining single and not marrying. The evidence was admissible. *Bright v. Barnett & Record Co.* 88 Wis. 299, 60 N. W. 418.

Counsel for defendant requested the court to submit to the jury, as a part of the special verdict, the following question:

"Was the death of Bernard M. Conway caused by any injury suffered at the time of the breaking of the ladder round, or was it caused by disease?" The court refused the request and submitted instead the following question: "Was Con-

way's death caused in whole or in part by the injuries so sustained by him?" This is assigned as error.

The question submitted calls for the direct determination of the ultimate fact upon which liability of the defendant is predicated by the federal Safety Appliance Act (36 U. S. Stats. at Large, 298, ch. 160) and the federal Employers' Liability Act (35 U. S. Stats. at Large, 65, ch. 149), which govern the case. The question suggested could have been answered in but one of three ways: (a) By the injury; (b) by disease; or (c) by both. If the jury were of the opinion that the death of deceased resulted solely from disease, they could not have answered the question submitted as they did. The answer to the question submitted effectively negatives any possibility that by answering the question requested they would have found that the death of the deceased resulted from disease, and any other answer would amount to a finding that his death was due in whole or in part to the injury. There is really very little difference in the ultimate effect of the two questions, but the question submitted calls for a direct finding upon the issue involved and is preferable. Counsel concede in their brief that "possibly the question submitted by the court would have been sufficient if the instructions of the court had covered the question of direct and remote cause, but such instructions were not given." This court has held that proximate cause has nothing to do with liability under these federal acts (*Calhoun v. G. N. R. Co.* 162 Wis. 264, 156 N. W. 198) and an instruction upon that subject would have been out of place. If elucidation of the question submitted was deemed necessary, counsel should have submitted a request upon that subject, which they failed to do.

Counsel for defendant requested the court to charge the jury, in connection with question 5, that "If you are not satisfied with reasonable certainty that his death was caused by such an injury you should answer question 5 No." The

court refused this instruction, but did charge the jury that "If you are satisfied by the preponderance of credible evidence that Conway's death was caused in whole or in part by injury sustained by a fall as alleged by plaintiff you should answer this question Yes." The jury was also informed that the burden of proof as to such question was upon the plaintiff, and in the early part of the charge it was said:

"When I instruct you that the burden of proof rests upon one party or the other to the action I mean that it is incumbent upon such party to establish the truth of the proposition involved, as he claims it to be, to your satisfaction by the preponderance of the credible evidence in the case."

Appellant criticises the instruction of the court with reference to this question because the court did not say that the jury should be satisfied *"to a reasonable certainty."* This phrase is not essential. This court has never held it to be indispensable to a correct charge upon the question of the proper degree of proof that the jury should be satisfied with reasonable certainty or to a reasonable certainty. It was held not to be error to so charge in *Pelitier v. C., St. P., M. & O. R. Co.* 88 Wis. 521, 528, 60 N. W. 250, because, as there said, if the jury was satisfied of a proposition it must be reasonably certain of it. The phrase "with reasonable certainty" is mere surplusage when used in such connection and adds nothing to the statement that the jury should be satisfied of the existence of a fact before it can so find.

The other errors complained of do not seem to merit special treatment. They have all been considered. No reversible error has been found, and the judgment should be affirmed.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs and costs of motion, on June 19, 1918.

KEITH and others, Appellants, vs. RUST LAND & LUMBER COMPANY, Respondent.

April 4—June 19, 1918.

Partnership: Agreement for purchase of lands: Construction: Consideration: Services contributed by one partner in lieu of money: His interest in the lands: Interest chargeable to him on share of price: Accounting: Retention of statement: Subsequent charges: Interest on partner's personal account: Lien on lands: Attorneys at law: Authority.

1. An agreement between F., who was an experienced woodsman, and five other persons for the purchase of land and timber provided that F. should go South and look over such tracts as he thought it would be profitable for the parties interested to purchase and should work exclusively for the interests of this syndicate or association of persons; that all his expenses should be paid by those interested proportionately but there should be no pay for his services or for any other person interested; that he was "not to furnish any of the purchase money for all or any of the lands so to be purchased, but that it is to be provided by the other five members of the syndicate and he to be charged with interest at the rate of six per cent., payable annually;" and that the interest of all should "be the same in the land. One sixth each. F. interest same as others, one sixth." *Held*, that there was no obligation on F.'s part to furnish, and no right on the part of the other partners to charge him with, or deduct from his one-sixth interest in any sale of the lands, one sixth of the original purchase price. If he were so charged he would in effect "furnish" a part of the purchase money, and the others would not "provide" it, but merely advance it, contrary to the terms of the agreement.
2. Under such agreement F. was to have, not merely a one-sixth interest in the proceeds or net profits from the sale of the land, but, equally with each of the others, a one-sixth interest in the land; and this interest was to vest at the same time, to the same effect, and with exactly the same conditions and limitations, and none other, as the respective interests of the other five.
3. The experience, integrity, and standing of F., together with the time and energy necessarily expended by him for several years, constituted a sufficient consideration moving from him to support the contract.
4. The provision that F. was "to be charged with interest at the

rate of six per cent., payable annually," construed in connection with the other provisions, means that he was to be charged in favor of the other five partners with interest annually on a sum equal to one sixth of the purchase price as it was from time to time paid for the land, until there should be realized from sales a sum equal to the entire purchase price with accrued interest.

5. The retention by F., without apparent objection, of a statement of account sent to him about two years before his death by the defendant corporation (to which the interests of the other five partners had been transferred), which account included a charge against him for one sixth of the purchase price of the lands and interest thereon, cannot be held to bind him as to that charge, nor can the other parties assert such a declaration on their part, as against the terms of the written agreement in that respect.

6. A subsequent charge made by said corporation, without further notification to or consultation with F., for a "portion of office and clerk's services," covering a number of years prior to the sending of the statement above mentioned, could not properly be allowed, both because it was a material change in the account after it had been rendered to F., and because its allowance would be in effect an allowance for services, directly contrary to the terms of the contract.

7. Another subsequent charge made by the corporation for a portion of the salary and expenses of one D. in looking after a part of the lands, covering a considerable time prior to the rendering of the account as above stated, and a charge for interest on this item, should have been disallowed for the reasons above stated and also because there was no proof of actual payment of said salary and expenses.

8. The allowance of interest upon the personal account of F. with the defendant corporation is *held* to have been proper.

9. If the balance found due to the defendant corporation upon the personal account of F. should be larger than the balance found due from the corporation on the land transaction, the amount of the difference in favor of defendant cannot be adjudged to be a lien upon the interest which F. had in the remaining lands, no such lien having been created by act of F. and there being no warrant therefor in the contract.

[10. Whether attorneys representing the estate of F. would have authority, by a stipulation that any balance found due the defendant should be a lien, to bind the estate and so affect the rights of creditors, is not decided.]

SIEBECKER, J., WINSLOW, C. J., and ROSENBERRY, J., dissent.

APPEAL from a judgment of the circuit court for Eau Claire county: A. H. REID, Judge. *Affirmed in part; reversed in part.*

April 24, 1893, at Eau Claire, Wisconsin, one Daniel Fitzhugh and W. A., R. E., and A. J. Rust, John S. Owen, and W. F. Gilchrist entered into a written contract for the purchase of land in the South which is recited in the opinion following.

In May, 1894, *Rust Land & Lumber Company,* defendant herein, was organized by certain of the signers of said agreement other than Fitzhugh, and, by agreement, whatever had been purchased under said contract at that time was conveyed to and the contract thereafter carried on by the defendant corporation in lieu of the individuals.

Daniel Fitzhugh was a woodsman of many years' experience, and after the signing of said contract proceeded to look over lands in the states of Mississippi and Arkansas, which were then purchased pursuant to such agreement by the other individuals therein interested or by said corporation after its organization. Large holdings were so purchased during the years 1894 and 1895 for an amount aggregating more than $61,000. In 1902 sales were made of certain portions of said property so purchased for an amount exceeding $100,000 and in considerable excess of purchase price, taxes, and all other expenses in connection with the same up to that time. The accounts concerning such transactions were kept by the defendant corporation and no statement thereof appears, so far as the record discloses, to have been submitted to Daniel Fitzhugh until May, 1907, when what purported to be a statement of the transactions from 1894 to February 25, 1907, was inclosed in a letter to him asking him to examine the same. He acknowledged the receipt thereof on the following day and added that he had not then had time to examine it. Nothing further appears to have been said or done by either of the parties to such agreement with ref-

erence to such statement of the account up to the time of the death of Fitzhugh in March, 1909. After his death the plaintiffs, *Thomas B. Keith* and the widow of Daniel Fitzhugh, *Bertha M. Fitzhugh,* were appointed administrators of his estate, and those two as such administrators, *Bertha M. Fitzhugh* as widow, together with *William* and *Daniel Fitzhugh,* the only children of Daniel Fitzhugh, deceased, commenced an action against the defendant corporation for an accounting in the transactions between the defendant and said Fitzhugh regarding such lands, and that there might be conveyed to such of the plaintiffs as were heirs of Fitzhugh an undivided one-sixth interest in any and all of the lands so purchased still remaining unsold, and the payment to them of the proportionate share in any and all profits derived from prior sales of said real estate.

From April 24, 1899, a separate account had been kept by the defendant corporation with Daniel Fitzhugh, involving looking after other land matters in which the defendant corporation was interested besides those included in the purchases made under the agreement of 1893, and which account included, from time to time, allowances to him for salary and for disbursements made by him on account of such other matters for the defendant as well as some disbursements made in connection with the lands purchased under the agreement of 1893. In the later years of this account no credit was made on account of the salary, and the balance was in favor of the defendant and particularly in the year 1908, when, on the written order of Fitzhugh, over $7,500 was directed to be paid to satisfy a certain judgment that had been obtained against him in favor of the representatives of one W. A. Rust.

An appeal was taken from the county court on this last mentioned account to the circuit court, and there, on the trial of the action brought by the administrators and the heirs of Daniel Fitzhugh for an accounting under the con-

tract of 1893, it was agreed by stipulation that the two matters might be heard together. Evidence was taken and the two proceedings disposed of by one judgment herein, which was in substance that there was due and owing to the *Rust Land & Lumber Company* under the separate account for transactions with Mr. Fitzhugh personally the sum of $14,799.21; that there was due to the estate of Daniel Fitzhugh, as his interest in the transactions under the contract of 1893, a balance of $7,987.16; and further adjudging that the heirs were entitled to an undivided one-sixth interest in the real estate still remaining undisposed of in Mississippi and Arkansas, with the condition, however, that such real estate should be subject to a lien in favor of the defendant corporation in an amount equal to the balance between the $14,799.21 and the $7,987.16, amounting to $6,812.05.

An appeal was taken by those designated as plaintiffs in the equity action from so much of the judgment as fixed the balance of $6,812.05 as being due the defendant, and from that part of the judgment declaring such sum to be a lien upon such real estate.

For the appellants there was a brief by *Sturdevant & Farr* of Eau Claire, and oral argument by *L. M. Sturdevant.*

For the respondent there was a brief by *Wilson & Armstrong* of Memphis, Tennessee, *Bundy & Wilcox* of Eau Claire, and *Wm. H. Fitzhugh* of Memphis, Tennessee, and oral argument by *Mr. Fitzhugh* and *Mr. Roy P. Wilcox.*

The following opinion was filed April 30, 1918:

ESCHWEILER, J. The disposition of this appeal required a construction of the contract of April 24, 1893, which reads as follows:

"Memorandum of agreement or understanding for the purchase of land and timber in the South, whereby it is agreed that Mr. Daniel Fitzhugh is to go South and look over any and all such tracts of land as he thinks it would be profitable for the parties interested to purchase, and work entirely and

exclusively for the interests of this syndicate or association of persons; that all his expenses of so doing will be paid by those interested proportionately, but there shall be no pay for his services or for any other person interested herein. It is understood and agreed that Mr. Daniel Fitzhugh is not to furnish any of the purchase money for all or any of the lands so to be purchased, but that it is to be provided by the other five members of the syndicate and he to be charged with interest at the rate of six per cent., payable annually. All purchases subject to approval. The interest of all to be the same in the land. One sixth each. D. Fitzhugh interest same as others, one sixth."

The learned trial court held that this contract created a partnership; that in the accounting thereunder Fitzhugh should be charged with one sixth of the purchase money invested in land as of the date of each investment; that as money was received from the sale of lands or rents or trespasses or sale of timber, such money should be applied first to the payment of expenses of looking after the land and paying the taxes and with interest on each item from the date of outlay to the date of repayment, and out of the balance to return to each of those interested, other than Fitzhugh, the capital invested; that upon money being available for such return of capital, one sixth thereof should be credited to Fitzhugh upon his obligation to his five associates based on their advance for him of his share of the capital, applying such credit first to the discharge of interest and then to the reduction of the principal; that when the net moneys received became sufficient to pay all the carrying charges and expenses and to return all the contributed capital, then Fitzhugh became entitled to an undivided one-sixth interest in the remaining lands as tenant in common and thereafter liable for one sixth of the expenses, provided there was not on hand money sufficient for such payments. That interest should be charged against Fitzhugh on advancements for carrying charges, such as taxes, etc., this being based by

the trial court, as stated by him, upon the equitable principle as requiring the estate of Fitzhugh to do equity when his representatives were asking for equitable assistance.

With the usual frankness of the trial court it was conceded that there were difficulties in arriving at the conclusion he did with reference to this contract. Great weight was placed by him upon the provision therein found, that Fitzhugh is "to be charged with interest at the rate of six per cent., payable annually." But for the language of the clause just quoted the trial court indicated that his opinion would have been that Mr. Fitzhugh was to receive a one-sixth interest in and to all lands purchased pursuant to said contract without being charged in any way with any portion of the purchase price thereof, but that he felt it impossible to give effect to that language requiring the charging of interest unless there should be assumed that such interest was chargeable upon some principal sum as due and owing under the contract from Fitzhugh to his associates for the purchase price.

In this contract the following features appear to us to be controlling:

First, that Fitzhugh is to have equally with each of the others a one-sixth interest in the land. We have no right to assume that when they say one-sixth interest in the land they meant one-sixth interest in the net proceeds or net profits from the sale of the land and not the land itself. Nor can we assume that when they say the interest of all is to be the same in the land that they meant the Fitzhugh interest was to be different from that of the five, they to be secured for the purchase money and he to share only when all the purchase money has been reproduced from the land and not until then. Again, unless the interest of Fitzhugh in the land vested at the same time, to the same effect, and with exactly the same and no other conditions and limitations than the respective interests of the five did, then Fitzhugh did not have the same interest as the others in the land.

Second, it was expressly stated that Fitzhugh "is not to furnish any of the purchase money."

Neither here nor in the expression following are words used to indicate that his one-sixth of the purchase price is considered as an advance. If this one-sixth purchase price is treated in the accounting, as was done by the trial court, as an advance to him or to his account by the others and to be taken out of the proceeds of the land or treated as a charge on a one-sixth interest in the land, he has in effect furnished a one-sixth of the purchase price; or again, if it be treated as a loan to him because of the requirement that he is to be charged with interest, then again he has furnished such amount within the reasonable meaning of that term.

Third, it was also expressly stated "but that it [the purchase money for all or any of the land so to be purchased] is to be provided by the other five members." They are to provide, not advance. "Provide" means to supply; to afford; to contribute. Webster, New Internat. Dict.

If the five others get the one-sixth of the purchase price repaid to them out of the proceeds of Fitzhugh's one-sixth interest in the land, or out of the land as an entire thing, then the five have in effect advanced that one-sixth of the purchase price; they have not contributed it, they have only advanced it.

We shall not here assume that these parties meant other than the plain ordinary meaning of the words and expressions that they used.

Trouble is experienced with the provision that Fitzhugh is "to be charged with interest at the rate of six per cent, payable annually." It is a confusing expression as there used. We do not, however, think that this confusion in the one clause can require that contradiction should be forced into the other clauses.

It was held by the court below that interest presupposes a principal sum upon which it can be charged and, none being

found in the terms of the contract, one must be imported, otherwise there is nothing upon which the interest charge is to be supported.

This appears to us to be an inverted process and an exalting of the incident above the principal. The result of the adoption of such view in the court below was to throw awry other and plain provisions of the contract. It in effect construed the language of the contract herein practically as though it contained the express provisions found in the contract involved in the case of *Rust v. Fitzhugh,* 132 Wis. 549, 112 N. W. 508, apparently between the deceased and one of the other parties to the agreement herein and drawn the year preceding the contract here. A comparison of such contracts makes evident the substantial distinction between a contract for net profits as in that case and for an undivided interest in real estate as in this case. The language of that contract, so far as pertains here by way of comparison, was as follows:

"Now, in consideration of one dollar to me in hand paid, receipt whereof is hereby confessed and acknowledged, I hereby agree to account for and pay over to W. A. Rust, his heirs or assigns, the one-fourth ($\frac{1}{4}$) of the net proceeds derived from the sale of said lands above referred to. By net proceeds, are meant all payments of principal and interest for said lands, taxes thereon and expenses connected with the care and sale of the same to be first deducted from the amounts received as principal and interest from the sales of said lands, and the balance remaining being the net profits, one fourth of the same to be paid by me to said Rust."

It is also urged that the construction by the court below should be adopted, for otherwise it would appear that Fitzhugh in this case was getting large returns for a small consideration. The enterprise, however, was one involving possibly a long interval before anything could be realized therefrom; it evidently was more or less of a speculation as to whether it would make large or any returns, and it involved

the pitting of the time and undoubted experience and integrity and standing of the deceased against the capital the others had or could procure, and we see no reason why the one should be regarded as less entitled to large returns than the other, and especially so when the parties themselves do say, as here, that "the interest of all to be the same in the land. One sixth each. D. Fitzhugh interest same as others, one sixth." The manna of large returns could not fall upon him and miss them. He could only make purchases of such real estate as met their approval. They had the veto power and he had no unlimited field for investment. They evidently had faith in him. That was a valuable asset, and with his time and energy necessarily expended for several years he surely contributed a valuable consideration sufficient to support this contract. It is not for a court, in a case like this, to measure and compare respective considerations now by the results as though those results were a certainty and not merely a hope, and not a prophecy even, in 1893. *Rust v. Fitzhugh, supra.*

We are satisfied from the language of this contract, then, that there was no obligation whatsoever on Fitzhugh's part to furnish, or any right on the part of the others to charge him with, or deduct from his one-sixth interest in any sale of the lands, this one-sixth of the purchase price as was done in the accounting.

He was, however, "to be charged with interest at the rate of six per cent., payable annually." We think the most reasonable construction to be given to this feature is that he was to be charged in favor of the other five with interest annually on a sum equal to a one-sixth of the purchase price as it was from time to time paid for the land until such time as there should be realized from the sale of the real estate a sum equal to the entire purchase price with accrued interest. Then such charge against Fitzhugh on that basis to cease.

No objection is made by the appellants to an allowance in favor of defendants of interest on advancements made by them for expenses and taxes until repaid by sales of the land, so no change will be made in the accounting in that regard, and the enterprise may therefore be charged with such expenses taxed and disbursements with interest as was done in the accounting approved by the trial court.

It is urged that by the retention, without apparent objection on the part of Fitzhugh, of the statement sent him in May, 1907, he became bound by all the items and charges therein, among which were charges for the one-sixth purchase price and interest thereon. But between such a statement and a written contract the contract must govern, and defendant cannot assert such declaration on its part in the teeth of the contract any more than it was allowed by the court below to assert its claim for interest on interest embodied in the same statement in the face of sec. 1689, Stats., providing that, unless agreed to in writing by the party sought to be charged, past-due interest shall not be compounded nor interest paid on interest.

The court allowed as a charge against the account of the Fitzhugh land purchase under date of September 21, 1908, an item as follows: "Portion of office and clerk's services for years 1899 to 1907, inclusive, two years at $200, seven years at $500, $3,900."

There was also allowed under date of May 1, 1909, a further charge for interest on the above charge from dates of yearly charges to the date of entry thereof, $871.56. There were a number of other corporations in which the stockholders of the defendant company were also interested and dealing in lands and lumber or acting as holding companies. They had offices and officers together, and as between some of them charges were made from time to time apportioning the office rent and clerk's hire. These items so entered as to such charges of office rent were made after the

account had been submitted to Mr. Fitzhugh in May, 1907, and without further notification to or consultation with him. The contract herein provided, "but that there shall be no pay for his [Fitzhugh's] services or for any other person interested herein."

Such an allowance for office rent and clerk hire would be in effect an allowance for services, directly contrary to this provision of the contract. It was also a material change in the account after it had been rendered to Mr. Fitzhugh, and the defendants have not lifted the presumptions that should be indulged against them by the rendering of such a statement. Such a statement was in the nature of a declaration on their part at least of what their claim of charges was and should, under the testimony here, bind them.

A further substantial change of the account of May, 1907, was made under date of December 31, 1908, and allowed by the court by an item of $821.63 as a portion of one Duschau's salary and expenses from 1905 to 1908 in looking after certain of the land connected with the Fitzhugh land purchase. It appears from the testimony that this charge was made by an officer of the defendant company upon merely a written statement rendered to him in the account of one F. W. Gilchrist, a signer to the contract of 1893 and who was largely interested in his own behalf in Southern lands and by whom Duschau was employed and paid. There was also, after Fitzhugh's death and in May, 1909, a further charge against his account of interest from the average date of entries on Gilchrist's books of this item of $821.63. There was no other proof as to this than that such item was received by defendant's officers as being on the books of Gilchrist. There was no proof of the actual payment of that item. These items should have been disallowed on the same grounds as the preceding ones also.

Complaint is made by the representatives of the deceased, Fitzhugh, that interest was improperly allowed upon the

personal account of Daniel Fitzhugh with the defendant corporation and that the same should have been treated as an open account current and interest allowable only from the date of the last entry thereof. Without discussing this account in detail, we are satisfied that the view taken by the trial court as to this matter of interest ought not to be disturbed and as to that account or balance as found and determined by him in the findings the judgment is affirmed.

The disposition that is being made of the Fitzhugh land account will undoubtedly so alter the situation herein that the balance due the plaintiffs on account of the land deal under the contract of April, 1893, will be larger than the balance found due the land company on the personal account between Fitzhugh and the defendant company, and that would make it immaterial to consider the question whether the balance in favor of the land company should be adjudged a lien upon the interest of the plaintiffs in the balance of the real estate. Should it, however, be a material question, we hold that there is no ground for such a holding as was made by the trial court. There was no such lien created by act of the deceased, nor is there any warrant in the contract for such a disposition. It would in effect make the claim of the *Rust Land Company* on its personal account with Fitzhugh a preferred claim as against all the other creditors of the deceased. The record as it is before us indicates that there are a large number of claims filed against that estate and far in excess of its apparent assets. There was some discussion at the commencement of the hearing of these two matters as to whether or not it might be finally adjudicated that any found balance in favor of the land company upon the claim it filed in the probate court should be held to be a lien upon any interest the plaintiffs might be found to have in the real estate, yet we are satisfied there was no sufficiently definite stipulation to that effect to authorize the determination by the court below as he did on that

point, even if there were sufficient authority in the attorneys representing the estate to so bind it and so affect the rights of creditors. Upon this latter point we express no opinion.

By the Court.—The judgment of the circuit court so far as it affects the determination as to the amount of the claim of defendant against the estate of Daniel Fitzhugh is affirmed, but so far as it affects the rights of the parties under the contract of 1893 it is reversed, and the cause remanded with directions for the taking of an account in accordance with this opinion, appellants to have costs and disbursements in the case.

SIEBECKER, J. I am of the opinion that the trial court correctly construed the contract in question and properly stated the account between the parties and hence the judgment should be affirmed.

WINSLOW, C. J., and ROSENBERRY, J., dissent.

On June 19, 1918, a motion by the respondent for a rehearing was denied, with $15 costs and costs of motion; and a motion by the appellants to amend the mandate was denied, without costs.

CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, Appellant, vs. SIMMONS COMPANY, Respondent.

April 6—June 19, 1918.

Municipal corporations: Lack of water for fire protection: Liability for losses: Interruption of service by negligence of individuals: Their liability.

1. Neither a municipality which has assumed the function of protection against fires by the installing of a waterworks system and a fire department, nor a corporation under contract with a municipality to supply water for such purposes, is liable to

individuals for fire losses due to an entire lack or an insufficient supply of water.

2. Where a city has been supplying water for fire protection and is ready and willing on its part to continue such service and a householder or inhabitant is in a position to receive the benefit thereof, a third person who unlawfully interrupts or interferes with such service is liable for resulting injury to such householder or inhabitant. So *held*, where a private corporation, in driving piles for a building, negligently pierced the intake pipe, thereby rendering useless the city waterworks system, and a building was burned because of the total lack of water to extinguish the fire.

APPEAL from an order of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

The appeal is from an order sustaining a demurrer to plaintiff's complaint.

Arthur A. Mueller of Milwaukee, for the appellant.

Chester D. Barnes of Kenosha, for the respondent.

ESCHWEILER, J. The complaint sets forth plaintiff's cause of action substantially as follows:

That the plaintiff, a fire insurance company, had issued in 1915 a policy upon a certain dwelling house in the city of Kenosha; that on October 31, 1916, the building was destroyed by a fire spreading from an adjoining building; that on November 16, 1916, plaintiff paid the owners of the building an amount which was justly due them under said insurance policy for the loss caused by said fire, and that pursuant to the terms of such policy the said owners sold and transferred to the plaintiff all rights of action that such owners might have against any one responsible for the burning of said dwelling, and the plaintiff thereby became subrogated to all such rights.

That at the time of such burning and prior thereto the said city of Kenosha, a municipal corporation, had constructed and was maintaining in said city a waterworks system consisting of an intake pipe conducting the waters of

Lake Michigan to a well or reservoir, from such to a pumping station, and thence being distributed by a system of pipes throughout the said city, and being designed to furnish to the owners of property and residents of Kenosha water for drinking or domestic purposes and for fire protection. The owners of the dwelling aforesaid were taxpayers of the city and as such entitled to the use of such water for such purposes.

That the said intake pipe was located in and upon the premises occupied by the defendant corporation; that while erecting a factory building on such premises and at a place known to the defendant company to be over and above the said intake pipe, the defendant caused foundation piles to be driven into the ground, and on October 24, 1916, did negligently and carelessly so drive the said piles that they pierced the intake pipe in numerous places, causing water to flow therefrom so as to make and render the waterworks system of the city absolutely useless for any purposes whatsoever, and that such condition of the said intake pipe and water system continued up to and including the time of the fire on October 31, 1916.

That solely by reason of the fact that the defendant had so negligently punctured the water intake there was a total lack of water which might have been used to extinguish such fire, causing the loss aforesaid. "That the loss and damage to said owners and the consequent loss to this plaintiff as herein set forth was proximately caused by the carelessness and negligence and the neglect and failure on the part of said defendant to exercise proper care and caution in the driving of said pile or piles, by the carelessness, negligence, neglect, and failure of said defendant in so driving said piles as to pierce said intake pipe, thereby causing the supply and pressure of water in the water mains of the city of Kenosha at said time to be wholly inadequate for purposes of fire protection."

To this complaint defendant demurred, the demurrer was sustained, and the plaintiff appealed.

The theory contended for by defendant and adopted by the trial court, that there is no liability shown from the facts stated in the complaint, was based upon the rule that under the law of this state there is no liability either as against the municipality, which has assumed the function of protection against fires by the installing of a waterworks system and a fire department, or as against any corporation that may be under contract with such municipality to furnish such water supply, for any fire losses due to an entire lack or insufficient supply of water. *Hayes v. Oshkosh,* 33 Wis. 314; *Britton v. Green Bay & Ft. H. W. W. Co.* 81 Wis. 48, 51 N. W. 84; *Krom v. Antigo Gas Co.* 154 Wis. 528, 140 N. W. 41, 143 N. W. 163.

The same rule is maintained in many other jurisdictions. *German Alliance Ins. Co. v. Home W. S. Co.* 226 U. S. 220, 33 Sup. Ct. 32, 42 L. R. A. N. S. 100; *Metz v. Cape Girardeau W. & E. L. Co.* 202 Mo. 324, 100 S. W. 651; *Thompson v. Springfield W. Co.* 215 Pa. St. 275, 64 Atl. 521; *Holloway v. Macon G. L. & W. Co.* 132 Ga. 387, 64 S. E. 330; *Niehaus Bros. Co. v. Contra Costa W. Co.* 159 Cal. 305, 113 Pac. 375, 36 L. R. A. N. S. 1045; *Allen & C. M. Co. v. Shreveport W. Co.* 113 La. 1091, 37 South. 980.

This rule, however, which it is not now intended to in any way qualify or limit, does not determine the question that is here involved.

But while such service is being actually rendered by a municipality, as while a fire is going on, and an immediate benefit is being received by a householder, there can be no question but that, as to all third persons, there is then a substantial right and interest in the householder to such service, which carries with it the further right to be protected against its invasion by third persons. At the moment such a right comes into existence there springs up at the same time a corresponding duty on the part of third persons not to unlawfully interfere therewith. For a breach of such duty by third persons there is a corresponding liability. This is recognized

in many cases. *Kiernan v. Metropolitan C. Co.* 170 Mass. 378, 49 N. E. 648; *Metallic C. C. Co. v. Fitchburg R. Co.* 109 Mass. 277, 12 Am. Rep. 689; *Clark v. G. T. W. R. Co.* 149 Mich. 400, 142 N. W. 1121, 12 Am. & Eng. Ann. Cas. 559, 562.

We see no good reason why this rule should not be carried one step further and as applied to the facts stated in this complaint require us to hold, as we now do, that so long as the householder or inhabitant of the city is in the position to receive, and the municipality is ready and willing to continue such service, the person who interferes with such relationship between the municipality and its inhabitant and thereby causes injury to such householder or inhabitant must respond for such damages as may be directly traceable to his interference as a proximate cause. It is not for a person who has interfered with such existing right or privilege to say that it is a mere gratuity on the part of the municipality or that the municipality cannot be compelled to continue such service or be held responsible for failure to do so. So long as the municipality is ready and willing to continue and the householder or resident to accept the benefit of such a water-system service, the unlawful interruption thereof by a third person and consequent damage is a wrong for which the law affords a remedy.

Therefore, if it shall appear from the evidence that defendant's negligence so interfered with or interrupted the service which the municipality had been rendering and was ready and willing on its part to continue to render to the householder whose house was destroyed by fire that it could properly be held the proximate cause of the loss of the dwelling, we see no reason why the defendant should not respond in damages. It follows therefrom that the demurrer to the complaint was improperly sustained.

By the Court.—The order of the circuit court is reversed, and the action remanded with directions to overrule the demurrer to the complaint.

BAKULA, Respondent, vs. SCHWAB, Appellant, and another, Respondent.

April 30—June 19, 1918.

Negligence: Personal injuries: Errors cured by remitting part of damages: Excessive damages: Joint tortfeasors: Concurring negligent acts: Judgment against one defendant only: Construction: Effect as to other defendant: Appeal: Parties: Res adjudicata: Contribution between defendants: Bringing in new parties: Discretion.

1. In an action for personal injuries, where the trial court required plaintiff, as a condition of judgment in her favor, to remit $1,000 of the $3,000 damages awarded by the jury, such remission is *held* to have compensated adequately for whatever prejudice, if any, resulted to defendant from the refusal to strike out certain testimony as to plaintiff having been taken to a hospital and there operated upon, from the inclusion in the special verdict of a question relating to mental suffering, from an instruction in which it was assumed that plaintiff was in the hospital for a longer time than the evidence showed, and from the refusal of a new trial asked for on the ground that the evidence was insufficient as a basis for assessing the damages—all of such rulings having been such as to affect only the question of damages.
2. Upon evidence that, as a result of personal injuries, plaintiff incurred expense of about $500, was confined to her bed for four months, and suffered much pain, an award of $2,000 (reduced to that amount from $3,000 awarded by the jury) is *held* not excessive.
3. In an action against two persons whose independent but concurring negligent acts are alleged to have caused an injury, where a verdict was directed in favor of one defendant and judgment rendered against the other, such judgment must be construed as one in favor of said first defendant although he is not mentioned therein—it being presumed that the judgment, as it should, disposed of all the issues.
4. Where notice of an appeal from such judgment by the defendant held liable was addressed to and served upon the other defendant, the latter, though in default, is a party to the appeal and the effect of the judgment as to him may be considered.
5. In an action against independent tortfeasors whose concurring wrongful acts are alleged to have caused an injury, a judgment in favor of one of the defendants but in plaintiff's favor against

the other is not *res adjudicata*, even upon the question of the liability of the defendants to the plaintiff, in a subsequent action for contribution between the defendants. Such a case is not within the reason of the rule which, in an action against defendants whose liabilities are founded upon contract, makes the judgment *res adjudicata* of the amount and nature of the indebtedness of all defendants to the plaintiff.

6. In order to be *res adjudicata* in a subsequent suit, a judgment must have been rendered in an action in which the parties to the subsequent suit were adverse parties, *i. e.* they must have been arrayed on opposite sides of an issue proffered by one and controverted by the other. The defendants in the tort action above mentioned were not such adverse parties.
7. So, too, an element essential to constitute *res adjudicata* is a right of appeal from the judgment; but in the case stated the defendant held liable cannot have the right to appeal and secure a reversal of the judgment on the ground that it was error to release the other defendant, for that would unjustly subject the plaintiff to the unnecessary burden, expense, and hardship of another trial merely because of a possible future controversy between the defendants upon the subject of contribution.
8. The defendant so held liable may bring his action for contribution against the other defendant and the latter cannot in such action use the judgment in the tort action for the purpose of showing that his wrong did not concur in producing the injury.
9. In a tort action, where a judgment holding the defendant liable will not affect his right to contribution from others whose concurring acts contributed to the wrong and, even if such others are brought in as defendants, the judgment cannot determine the rights of the defendants among themselves on the question of contribution, the trial court should exercise its discretion under sec. 2610, Stats., and deny an application, by the defendant originally sued, to have such others made parties. The right of the plaintiff in such a case to make his own election in the matter of joining tortfeasors as defendants should be preserved.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

On the 14th day of October, 1915, the plaintiff was a passenger for hire in an automobile operated by defendant *Schwab,* going from Hales Corners to the city of Milwaukee, both in the county of Milwaukee. The automobile was proceeding in a northeasterly direction on what is known as the

Janesville Plank Road. As it approached the intersection of what is known as the Mill Road the driver thereof turned to the left to pass a certain horse and buggy driven by the defendant *J. A. Wilkinson.* As the driver of the automobile was about to pass, the horse and buggy turned to the left for the purpose of taking the Mill Road in a westerly direction, compelling the driver of the automobile to swerve further to the left in order to avoid a collision, the result being that the automobile ran into a ditch on the side of the road, resulting in personal injuries to the plaintiff. She brought this action to recover therefor in the circuit court for Milwaukee county against the defendant *Martin Schwab.* Upon motion of *Schwab* the defendant *Wilkinson* was made a party defendant to the action, and it proceeded to trial in that court against both defendants. No cross-complaint was made or filed by either defendant, and there was no issue between them. At the close of the testimony the court directed a verdict in favor of the defendant *Wilkinson.*

The jury returned a special verdict in which it found (1) that the driver of the automobile in which the plaintiff was riding at the time she was injured was not in the exercise of ordinary care; (2) that such want of ordinary care was the proximate cause of the injury to plaintiff; (3) that plaintiff suffered pain, mental and physical, resulting from this injury after she left the hospital; and (4) fixed her damages at $3,000.

The defendant *Schwab* moved to set aside the verdict and for a new trial upon various grounds. Upon this motion the court ordered a new trial unless the plaintiff remit $1,000 from the verdict within twenty days. The plaintiff duly filed her remission of $1,000 from the verdict, and judgment was entered thereon in favor of the plaintiff and against the defendant *Schwab* for $2,000. From such judgment the defendant *Schwab* brings this appeal.

For the appellant there was a brief by *Lehr & Kiefer,* attorneys, and *Wm. E. Burke,* of counsel, all of Milwaukee, and oral argument by *Mr. Burke.*

For the respondent *Bakula* there was a brief by *Joseph G. Hirschberg,* attorney, and *Horace B. Walmsley,* of counsel, both of Milwaukee, and oral argument by *Mr. Hirschberg.*

OWEN, J. The evidence shows that the day after the accident the plaintiff was confined to her bed and Dr. Graham was called to attend her. He was in constant attendance upon her until the 19th day of December following, when he was discharged, and Dr. Hoermann was employed and attended her until her recovery. Dr. Graham testified that when he first examined the plaintiff she had a temperature of 103 with severe pains over the entire abdomen, especially on the left side. She had an indurated mass on the left side through the vagina extending up to the anterior superior spinous process. As time passed on, that ecchymotic condition became greater, due to the fact that the blood became more stagnant and collected about that injured part. She became very sick and he was led to believe that she had an abscess in the pelvic cavity. On October 31st he put her under chloroform and examined that region. He found a congealed gaseated mass. He also performed a curettement. On the 21st day of November he performed what he calls a major operation to determine what caused the congested mass in the left iliac fossa. During the time from October 16th to December 19th he saw her from one to three times a day. She was very much excited, weak, had high temperature, and was in bed during all of the time. During that time her condition was generally very painful and he considered it extremely serious. He expressed the positive opinion that her condition was caused by the injury. When he left her on December 19th she was improving, but she would at least

have to have the services of a physician for six or eight weeks after that. She had temperature when he left her and would have it for at least three weeks from that time.

The plaintiff testifies that after Dr. Graham was discharged and Dr. Hoermann was placed in charge of the case she was taken to the hospital on the 19th of December, where an operation was performed upon her. She remained in the hospital from the 19th day of December until the 10th day of January, when she was taken home and there confined to her bed until April, 1916. That is all we know concerning her condition after Dr. Graham was discharged, as Dr. Hoermann was not called as a witness in the case. Neither do we know the reasons for, nor the nature of, the operation performed by Dr. Hoermann at the hospital, as the plaintiff could give no information upon that matter.

Upon the trial, pursuant to an order of the court, Dr. P. H. McGovern made a physical examination of the plaintiff. Dr. Graham was present at this examination. He found a fibroid tumor in the womb. He testified that the tumor must have been coming on for some time. It was not due to injury. It was his opinion that the condition described by Dr. Graham was due to the fibroid tumor and not the injury. Dr. Graham, however, testified positively that there was no fibroid tumor present at the time he was attending plaintiff.

At the conclusion of the testimony defendant *Schwab* moved to strike out all of the testimony of the plaintiff to the effect that she was taken to the hospital and was there operated on by Dr. Hoermann and incurred expense, for the reason that it did not appear in the case that she went to the hospital by reason of the accident. He assigns the refusal of the court to strike out this testimony as error. He also claims that the court erred in including question No. 3 in the special verdict, because there was no evidence that she suffered mental pain at any time. Another alleged error is the instruction of the court relative to question No. 3, wherein the court assumed

that the plaintiff was in the hospital until April, 1916. Error is also assigned upon the refusal of the court to grant a new trial, for the reason that there was not sufficient testimony from which the jury could honestly and clearly determine the amount of plaintiff's damages, the damages being necessarily based upon conjecture and guess.

We will dispose of all these assignments of error with the statement that we are entirely satisfied that whatever prejudice, if any, resulted to the appealing defendant by reason of the court's action in these various respects was adequately compensated by the remission of $1,000 from the verdict. We think the testimony fully sustains the judgment for the plaintiff for $2,000. In the first place, she proved expenses in the neighborhood of $500; $275 to Dr. Graham, services of a girl at $5 per week, and board at $4 per week, for twenty weeks, and the services of a scrub woman at $2 per week for a like period. This leaves but $1,500 to compensate her for the pain, suffering, inconvenience, and loss of time. That she suffered seriously is fully established by the testimony of Dr. Graham; and the trial judge, in his decision upon a motion for a new trial, says: "It seems quite certain that she was a severe sufferer for some time after the accident, and that her suffering was produced by it." She was attended by Dr. Graham for more than two months, and his testimony was that she would require the services of a physician, as a result of the injuries, for a period of six to eight weeks thereafter. It appears that she was confined to her bed until April, and that she had undergone an operation, in the hospital, between the 19th of December and the 10th of January. It does not appear that her prolonged confinement in bed, nor the operation in the hospital, was due to the injury; but, excluding that from consideration, and taking into consideration only the testimony of Dr. Graham, from which it may fairly be inferred that she was confined to her bed for a period of four months as a result of the injury, we do not think the

judgment is excessive. *Duncan v. Grand Rapids,* 121 Wis. 626, 99 N. W. 317; *Roy v. La Crosse,* 148 Wis. 266, 134 N. W. 363.

The defendant also seeks a reversal of the judgment because of the error of the court in directing a verdict in favor of the defendant *Wilkinson.* He claims that he is entitled to a reversal because, if the defendant *Wilkinson* were held, he would be entitled to contribution; that, upon the present state of the record, *Wilkinson* has been discharged from liability, and that this is *res adjudicata* as between *Schwab* and *Wilkinson* in any future action which may be brought by *Schwab* against *Wilkinson* for contribution. The respondent replies that, while the court directed a verdict in favor of *Wilkinson,* the judgment makes no disposition of the action as to him; that there is no judgment discharging him; that no appeal has been taken from any judgment to which he is a party; that he is not in court on this appeal, and that his rights cannot be considered.

Wilkinson was a party to this action. His liability to the plaintiff was in issue. A trial thereof was had, and the court directed a verdict in his favor. It is familiar that there can be but one judgment in the same action, and that judgment should dispose of all the issues. While *Wilkinson* is not mentioned in the judgment he is not held liable by the terms thereof; and, bearing in mind that the judgment is presumed to have disposed of all the issues, if we are to regard substance rather than form, the judgment as rendered will have to be construed as one in favor of *Wilkinson.* It is idle to say that *Wilkinson's* rights are not judicially determined in this action, and the judgment must be so construed. The notice of appeal was addressed to and served on *Wilkinson;* he is a party to this appeal, though in default, and the effect of the judgment as to him may be considered.

We think there was sufficient evidence in this case to take the question of *Wilkinson's* negligence to the jury, and that

the court erred in directing a verdict in his favor. This being so, it becomes necessary to consider whether the defendant *Schwab* is entitled to a reversal of the judgment by reason thereof.

Appellant's argument, as before stated, is based upon the proposition that the judgment is *res adjudicata* upon *Wilkinson's* liability to him in any future action which *Schwab* may bring against *Wilkinson* for contribution. We do not consider the question of whether, under the facts shown, *Schwab* would have a valid claim for contribution against *Wilkinson* in any event. That question can only arise when such action shall be brought. We must consider, however, whether the judgment in this action, as we have construed the same, is *res adjudicata* upon the question of defendant *Wilkinson's* liability to the plaintiff in any future action which *Schwab* may bring against *Wilkinson* for contribution, and, if so, whether appellant is entitled to a reversal thereof in order to protect him from such result.

Is the judgment rendered in this action *res adjudicata* in an action for contribution between the codefendants? It is generally held that a judgment in favor of the plaintiff against one or more codefendants is *res adjudicata* in subsequent actions between such codefendants so far as the question of indebtedness of the defendants to the plaintiff is concerned, but no farther. An examination of the authorities, however, will disclose that in the cases where it has been so held the indebtedness was based upon contract binding the defendants either jointly or jointly and severally, or where there was a responsibility over, as in cases of principal and surety, and the like. Under such circumstances there is a manifest propriety in holding the judgment in the original action to be *res adjudicata* upon the question, because all defendants, parties to such action, had equal right and opportunity to contest the issue and to appeal from an adverse decision. In such question all defendants had a common in-

terest, common rights, and common opportunities. Furthermore, where the liability of the defendants to the plaintiff is founded upon a contract, whether written or resting in parol, the judgment in the original action establishes the status, the force and effect of the contract, and fixes the rights of all who are parties to the contract and parties to the action so far as its validity is concerned, and fixes the amount the plaintiff who sues thereon is entitled to recover.

We have been cited to no case in which it has been held that a judgment rendered in an action against separate tortfeasors is *res adjudicata* even upon the question of the liability of the defendants to the plaintiff in a subsequent action between the tortfeasors, and our independent search has revealed but one such case. In *Westfield G. & M. Co. v. Noblesville & E. G. R. Co.* 13 Ind. App. 481, 41 N. E. 955, the court expressed the opinion, under such circumstances as we are considering here, that while the rights of defendants as between themselves are not adjudicated, yet the fact of the liability of each to the plaintiff is adjudicated and determined both as between themselves and him and between each other. It will be noticed that this is not the opinion of a court of last resort. If it does not constitute the only authority in this country upon the question, we do not hesitate to say that it has received but scant judicial consideration, and we feel free to approach the question as an original one, and to adopt such conclusion as seems most logical and will best promote the interests and preserve the rights of litigants.

We see a striking difference between an action brought to hold independent tortfeasors and an action based upon a contract defining the liabilities of the defendants to the plaintiff. In the latter case the liability springs from a common source. It is defined by the same instrument. It is established by the same language. In truth and in fact, the liability is joint. In the case of independent tortfeasors, such as here, the liability grows out of the independent conduct of each

defendant. The term "joint tortfeasors," so often used, is misleading to say the least. In cases like this they are not joint tortfeasors in any other sense than that they may be joined as defendants by one who has suffered injury or damage by reason of their independent but concurring wrong. They may both or all be liable for the injury which the plaintiff has sustained, but such liability does not arise from their joint action. It arises from their independent action, which concurred to consummate the injury. If it be found in such an action that A. is liable for the injury it does not follow that B. also is. The liability of one to the plaintiff is not fixed when that of the other is ascertained, because their liability does not spring from a common source. The liability of each grows out of an entirely independent state of facts. We believe that the foregoing is sufficient to indicate that the reason of the rule which makes the judgment in the original action against defendants, whose liabilities are founded upon contract, *res adjudicata* of the amount and nature of the indebtedness of all defendants to the plaintiff, does not apply in tort actions.

Having pointed this distinction between actions on contract and actions in tort, we will now inquire whether the situation presented meets the tests of fundamental essentials necessary to constitute *res adjudicata.* We think it will fail to meet at least some such tests necessary to constitute it *res adjudicata* even upon the question of the indebtedness or liability of defendants to the plaintiff in a subsequent action for contribution between the defendants.

It is fundamental and universal that the former judgment proffered as *res adjudicata* in a subsequent suit must have been rendered in an action in which the parties to the subsequent suit were adverse parties. What is meant by adverse parties scarcely needs definition. Its significance is apparent from the expression itself. They must be opposite parties to an issue between them. The issue must be proffered by one

and controverted by the other. They must be arrayed on opposite sides of the issue. Manifestly the relation between *Schwab* and *Wilkinson* in the instant case does not respond to this requirement. There was no issue between *Schwab* and *Wilkinson*. The plaintiff was endeavoring to hold both. It was the endeavor of each to escape liability to the plaintiff. Each might have sought to escape this liability by fastening the blame upon the other, but in no other sense were they adverse parties. *Schwab* did not have control of the proceedings to enable him to exhaust the question of *Wilkinson's* liability. A situation apt to arise under similar circumstances is well illustrated by the case of *Ellis v. C. & N. W. R. Co., ante,* p. 392, 167 N. W. 1048. In that case it appeared that the person injured sued the Wisconsin Traction, Light, Heat & Power Company and the Chicago & Northwestern Railway Company. Upon the trial plaintiff's efforts were vigorously addressed to the matter of establishing the negligence and liability of the traction company, no particular attention being paid to the railway company, resulting in a nonsuit as to the latter. The traction company being powerless to properly present the case against the railway company, Ellis, a stockholder and officer of the traction company, feeling that, if matters continued in such a pass, it would result in that company being held exclusively liable, purchased the claims of the injured persons in order to protect the rights of the traction company and to secure trial of the case against the railway company. Will any one argue that the traction company and the railway company were adverse parties in the original litigation? And is there any justice in saying that the traction company should be bound by the outcome of that suit in its future action for contribution against the railway company? It seems to us not, and that to do so would be a reproach to the law and to legal procedure.

In arriving at a determination of this question we may and should look to the consequences. An element essential to

constitute *res adjudicata* is a right of appeal from the judgment. If this judgment is to be held to be *res adjudicata* between *Schwab* and *Wilkinson,* it is apparent that *Schwab* has the right of appeal, because he is an aggrieved party. Sec. 3048, Stats. But what does that mean? It means that the plaintiff, who is entirely satisfied with the judgment she has secured, must be put to the burden, expense, and hardship of another trial of her action. Such a proceeding would be intolerable. It cannot be thought of. This plaintiff must not be subjected to any such burden because of a possible future controversy between the defendants upon the subject of contribution. The suggestion that the case should be reversed for this reason becomes more absurd when we reflect that a new trial of the action will settle nothing between *Schwab* and *Wilkinson.* Their rights are not at issue and cannot be until the judgment has been paid, because until that time an action for contribution does not accrue. The only thing to be accomplished by a new trial is to save defendant *Schwab* from a conclusive judicial determination of a single fact necessary for him to establish in order to recover contribution, namely, the fact that *Wilkinson's* negligence did not concur in producing the actionable wrong. If the defendant *Wilkinson* had not been made a party no question of *res adjudicata* would have arisen. Why will not justice be done by leaving *Schwab* and *Wilkinson* in the same position they would have been if he had not been made a party? It seems to us that not only the application of well established legal principles, but considerations of justice as well, dictate the conclusion that the judgment appealed from is not *res adjudicata* upon this question.

It follows that *Schwab* is not aggrieved by that feature of the judgment releasing *Wilkinson.* He cannot appeal therefrom and cannot secure a reversal and new trial because the court erred in releasing *Wilkinson.* The judgment will have no more force or effect in this respect than if *Wilkinson* had

not been made a party to the action. This leaves not only *Schwab,* but any independent tortfeasor, at liberty to bring his action for contribution against any and all persons who it is claimed were in part responsible for the wrong, and this whether they were made parties to the original action or not, and the judgment cannot be used by a party discharged in the original suit, in an action for contribution, for the purpose of showing that his negligence did not concur in producing the wrong.

While what has already been said is all that is necessary to dispose of the issues of this case, we deem it proper to refer briefly to the practice indulged in bringing in *Wilkinson* as a party defendant at the instance of *Schwab. Schwab's* action in this respect was based upon sec. 2610 of the Statutes, which makes provision for the bringing in of all parties necessary to a complete determination of the controversy, and especially upon the provision added thereto by sec. 6, ch. 219, Laws 1915, which provides that "A defendant who shows by affidavit that if he be held liable in the action he will have a right of action against a third person not a party to the action for the amount of the recovery against him, may, upon due notice to such person and to the opposing party, apply to the court for an order making such third person a party defendant in order that the rights of all parties may be finally settled in one action, *and the court may in its discretion make such order.*" We think that in cases such as this the court should exercise its discretion and deny the application.

From what has already been said it is plain that the interest of *Schwab* did not require the bringing in of *Wilkinson.* In such case the judgment rendered will not affect the right of the party held liable, to contribution from those whose wrongs contributed to the liability. The judgment rendered cannot dispose of the rights of the defendants as between each other upon the question of contribution. Such action will not accrue until the judgment has been paid. There can be

no cross-issue between the defendants upon this subject. The reason for the provisions of sec. 2610 is to enable the court to determine the rights of all interested in the controversy in the one action. From the very nature of things this cannot be done in an action of this nature. There is no purpose or object, therefore, in bringing in other parties who may also be liable. Their presence only adds confusion. This troublesome question would not have arisen if the court had denied the application to make *Wilkinson* a party to the action. Immemorially it has been the right of the plaintiff to make his own election in the matter of joining tortfeasors as defendants. It has been his privilege to institute his action against one or part or all tortfeasors responsible to him. We can see no reason why this venerable rule should be changed, nor why the plaintiff should be compelled to involuntarily litigate with parties not of his own choosing.

We are impelled to make these observations not only because the record here brings the matter forcibly to our attention, but because in the *Ellis Case* (*Ellis v. C. & N. W. R. Co., ante,* p. 392, 167 N. W. 1048), where it was held that contribution may be had between tortfeasors who are guilty of no intentional or conscious wrong, the same practice was indulged. As nothing was said concerning the practice in the opinion rendered in that case, it may be considered to have met with our approval. The dominant question there considered was whether there could be contribution between such tortfeasors. No point was made on the practice indulged and it was not considered by us. The *Ellis Case* and this may be regarded as supplementary of each other. The *Ellis Case* deals with the question of substantive law and this deals with the matter of procedure. There is no conflict between the two.

By the Court.—Judgment affirmed.

ELMERGREEN, Respondent, vs. KERN, Appellant.

April 30—June 19, 1918.

New trial: Option to remit part of damages: Power to extend time for such remission until after appeal: Excusable neglect: Relief from order, when may be granted: Evidence: Record in another action.

1. The trial court ordered that if, within twenty days, the plaintiff should remit from a verdict in his favor all sums in excess of $5,000, he might enter judgment for that amount, but if he failed so to remit a new trial should be had. Afterwards the court granted a stay of proceedings on the twenty-day clause in said order "until twenty days after return of *remittitur*" on an appeal from the order. *Held*, that such stay of proceedings was beyond the power of the trial court, since its effect would be to give plaintiff the right at his option to enter judgment, irrespective of the determination of the appeal, for an amount fixed in advance by the trial court.
2. Plaintiff in such case not having remitted the damages within the twenty days limited in the original order, that order became an order for a new trial, and upon the dismissal of the appeal the case stood for trial.
3. Not only the motion for relief, but also the order granting relief under sec. 2832, Stats., must be made within a year after the moving party has notice of the proceeding against which relief is sought.
4. In an action to recover damages for breach of a contract to transfer to plaintiff certain stock in the C. mining company, it appeared that a very large part of the consideration for such contract was an agreement by plaintiff to stop the prosecution of another suit, affecting the title to certain mining claims, which plaintiff had brought in Utah against other companies which were predecessors in title of the C. mining company; that defendant was a stockholder in said other companies as well as in the C. mining company; and that plaintiff did in fact prosecute the Utah suit to judgment, the result being a determination that he had no interest in said mining claims. *Held*, that the record of the Utah suit, offered in evidence by defendant, should have been received.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN C. LUDWIG, Circuit Judge. *Reversed.*

Damages on contract. The plaintiff claims that in De-

cember, 1905, the defendant made an oral contract with the plaintiff by the terms of which it was agreed that the plaintiff should stop the prosecution of a certain suit then pending in the state of Utah and refrain from bringing further action against the defendant and the Cliff Mining Company, a corporation in which the defendant was interested, and was to turn over to the defendant certain documents and memoranda; that the defendant would in consideration thereof cause to be transferred to the plaintiff a certain amount of stock in the Cliff Mining Company. The action was tried in 1909 before the late Hon. JOHN C. LUDWIG and a jury, resulting in a verdict for the plaintiff for $20,987.50. The defendant moved for judgment notwithstanding the verdict, and in the alternative for a new trial. On July 12, 1912, the trial court entered an order that plaintiff be allowed to remit from the verdict all sums in excess of $5,000, and in case the plaintiff so remitted within twenty days that he be allowed to enter judgment for that amount; but that "in case the plaintiff fails to remit as aforesaid within twenty days from and after the date of this order, then and in such case the said verdict is hereby set aside and a new trial of the issues in this action is ordered." On the same date the following entry was made on the court journal: "Plaintiff moves for a stay of proceedings on the twenty-day clause until twenty days after return of *remittitur* on the appeal about to be taken from the order of July 12, 1912. Motion granted."

From the order of July 12, 1912, both parties appealed to the supreme court, and the plaintiff failed to file any *remittitur* within the twenty days specified in the original order. The appeal was continued in this court from time to time, and finally a stipulation was entered into by the attorneys for the parties, pursuant to which an order dismissing the appeal was entered on January 12, 1915, the *remittitur* being filed in the office of the clerk of the circuit court for Milwaukee county on December 9, 1915.

Plaintiff claims that the case was continued here from time

to time against his objection; that the stipulation made by his attorney by virtue of which the appeal was dismissed here was without his authority or consent, and that he had no knowledge of the dismissal of the appeal until July, 1916. Other attorneys were employed, and in December, 1916, a motion was made in this court for a reinstatement of the appeal, based upon affidavits tending to show negligence on the part of plaintiff's attorney and want of authority in him to act in the premises. The motion to reinstate the appeal was opposed, counter affidavits were filed, and on February 13, 1917, the motion to reinstate the appeal was denied. In May, 1917, the plaintiff procured from the circuit court for Milwaukee county an order requiring the defendant to show cause why judgment should not be entered against him for $5,000 and interest, with costs, in accordance with the order of July 12, 1912. There were supporting affidavits, the motion was opposed and counter affidavits filed, and on August 1, 1917, the matter was heard before Hon. E. T. FAIRCHILD, the benefit of sec. 2832, Stats., being claimed by the plaintiff; and on August 29, 1917, a formal order was entered directing judgment in favor of the plaintiff for the sum of $5,000 and interest from the 9th day of October, 1909. Judgment was entered accordingly in favor of the plaintiff, from which the defendant appeals.

For the appellant there was a brief signed by *Flanders & Fawsett,* attorneys, and *John E. Tracy,* of counsel, all of Milwaukee, and oral argument by *Mr. Tracy.*

For the respondent there was a brief by *Umbreit, Mahon, Thompson & Jenner,* attorneys, and *Charles S. Thompson,* of counsel, all of Milwaukee, and oral argument by *Charles S. Thompson.*

ROSENBERRY, J. It is to be regretted that this appeal must be disposed of upon practice questions. It hardly needs more than a statement of the facts to show that the circuit court for Milwaukee county had no power to enter an order

permitting the plaintiff to remit all but $5,000 from the verdict and take judgment therefor twenty days after the return of the *remittitur* on appeal. It would be an anomalous thing if a trial court by such an order could limit the effect of the appeal and predetermine the issues in favor of one or the other of the parties after the matter had been heard and determined in this court, to the extent of giving one of the parties the right at his option to enter judgment, irrespective of the determination of the appeal, for an amount fixed in advance by the trial court. If such a practice were sustained it would make of this court a moot court instead of an appellate court. The order of July 12, 1912, was not an appealable order unless it was an order granting a new trial. Plaintiff did not file his *remittitur* within the twenty days, and it being beyond the power of the court to extend the time within which the plaintiff might remit and enter judgment in accordance with the original order until twenty days after the return of the *remittitur* on appeal, it must be held that the order of July 12, 1912, became by the lapse of time an order granting a new trial. The appeal therefrom, assuming it to be properly taken, having been dismissed, upon the filing of the *remittitur* in the circuit court for Milwaukee county the case stood for trial.

The respondent claims that the circuit court, pursuant to the provisions of sec. 2832, Stats., could extend the time within which plaintiff might elect to file the *remittitur*. That section provides:

"The court or a judge may likewise, in discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, stipulation or other proceeding against him, through his mistake, inadvertence, surprise or excusable neglect and may supply an omission," etc.

Waiving the question as to whether or not notice to plaintiff's original attorneys was notice to him, it is conceded that plaintiff had notice of the dismissal of the appeal in the month

of July, 1916. The decision upon the motion to extend the time within which the *remittitur* might be filed was made August 1, 1917, and the order extending the time was entered August 29, 1917. It has been repeatedly held that it is not enough that a motion for relief under sec. 2832 be made within a year after the party has notice of the proceeding against which he is seeking relief, but that the court granting relief must act within the year. *Fischbeck v. Mielenz,* 162 Wis. 12, 154 N. W. 701, and cases cited.

The order extending the time twenty days after the filing of the *remittitur* being beyond the power of the trial court to make in this instance, the proceeding under sec. 2832, Stats., is referred to only for the purpose of emphasizing the necessity of action by the court to which the application is made within the time there specified.

One question affecting the merits is presented by the record in this case which we think should be passed upon in view of the fact that a new trial must be had. The facts are very intricate, the trial having extended over a period of three weeks, and we shall not attempt a full statement, but shall state only such facts as are necessary to present the question: It appears that after the making of the alleged contract in 1905, by the making of which it is claimed plaintiff agreed to stop the prosecution of a certain suit then pending in the state of Utah, he thereafter prosecuted said suit to final judgment, and in the trial of this action the record of the Utah action was offered in evidence and the trial court declined to receive it. It appears that the suit in question, being one brought by the plaintiff here against the Ophir Tunnel Company and other defendants, affected the title to certain mining claims which were then or thereafter owned by the Cliff Mining Company. The result of the trial of the Utah suit was a determination that the plaintiff had no interest in these claims. In the Utah suit the plaintiff in this action was the plaintiff there; the Ophir Tunnel Company, Michigan Ore Company,

A. B. Herrmann, Bernard H. Stewart, James A. Burtchart, Frank Worthing, Peter Weimer, A. N. Cherry, Albert Richter, Jessie Weimer, John B. Weimer, and Edward Pilt were the defendants. The Ophir Tunnel Company and the Michigan Ore Company were predecessors in title of the Cliff Mining Company, and the defendant here was a stockholder in said companies and also in the Cliff Mining Company. The record in the Utah suit should have been received in evidence by the trial court.

It appears from the record in this case that a very large part of the consideration for the contract which plaintiff claims the defendant here entered into was the withdrawal of the Utah suit. It also appears from the record that the information which plaintiff had, and which he agreed to turn over in part performance of his contract with the defendant, related to the so-called California claim and could not have been of very substantial value for the reason that the defendant or his company was thereafter obliged to pay $20,000 in settlement of claims based upon the adverse ownership of the California claim. If the record in the Utah suit had been received and the whole case were before us, a very serious question as to the right of the plaintiff to recover any damages other than for the value of the memoranda furnished in reference to the California claim would be presented. Had the record in the Utah action been received, the plaintiff might have offered further proof; so that the record as it stands is incomplete. The whole matter not having been presented, it cannot now be determined.

By the Court.—Judgment reversed, and cause remanded for a new trial.

BRENDLSON, Respondent, vs. ED. SCHUSTER & CO., INC., Appellant.

May 2—June 19, 1918.

Negligence: Operation of passenger elevator: Mechanical impossibility: Veracity of witnesses: Question for jury.

In an action for injuries alleged to have been caused by negligent operation of an elevator in defendant's store, plaintiff and another witness testified positively that the elevator was suddenly set in motion while the doors were open and passengers were leaving it. It was shown that it was a mechanical impossibility to move the elevator while the doors were open, except by the use of an emergency electric button which was ordinarily covered by a glass plate held in position by screws, and two witnesses for defendant testified that such covering was in proper position at the time of the accident. *Held*, that the question of the veracity of the witnesses for the respective parties was involved and was for the jury.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The defendant conducts a department store in the city of Milwaukee. On June 11, 1917, the plaintiff, accompanied by one Mrs. Stockman, was shopping in said store, and, for the purpose of reaching the second floor, made use of one of the elevators operated therein. She and Mrs. Stockman testified that the elevator stopped about a foot below the level of the floor; that Mrs. Stockman attempted to leave the elevator while it was in such position; that the operator of the elevator, without closing the doors and without any warning, suddenly set the elevator in motion for the purpose of bringing it to a level with the floor, throwing Mrs. Stockman through the door and giving plaintiff a sudden jerk which threw her against the side of the elevator, as a result of which she sustained certain injuries, for which she brings this action. She claims negligence on the part of the operator of

the elevator in unexpectedly setting the same in motion when the doors were open and passengers were leaving the same.

It rather conclusively appears that the elevator is so constructed as to make it impossible to move the same either up or down while the doors are open. The doors are opened by a lever, which disengages a knife-and-fork switch, so that the moment the doors are opened the knife pulls out of the fork, disconnecting the power, setting the brakes, and rendering the elevator inert. This safety device was placed on the elevator for the purpose of preventing it from being moved while the doors were open and to prevent accidents similar to the one claimed to have occurred. It further appears, however, that there is an electric button located beneath a glass plate covering the same, by means of which the elevator can be used when the doors are open. This was placed on the elevator to be used in cases of emergency. It cannot be reached, used, or manipulated when the glass covering is on. The glass covering may be broken or taken off by removing the screws which hold it in position. It appeared in evidence that this glass covering was generally removed when the elevator was being greased or repaired, and at such times, by use of the electric button, it moved freely up and down when the doors were open. The elevator operator and the store electrician testified positively that this glass plate or covering was in its proper position at the time of the accident.

The case was tried in the civil court of Milwaukee county, where a verdict was directed in favor of the defendant. Plaintiff appealed to the circuit court, where the judgment of the civil court was reversed and a new trial ordered. From this order of the circuit court defendant appealed to this court.

For the appellant there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

For the respondent there was a brief by *Raymond J. Cannon,* and oral argument by *Mr. Cannon* and *Mr. W. L. Gold,* both of Milwaukee.

OWEN, J. The order of the circuit court reversing the judgment of the civil court and ordering a new trial in the circuit court must be affirmed. The record discloses a question for the jury. Plaintiff and her companion, Mrs. Stockman, testified positively that the elevator moved while the doors were open. Defendant contends that it effectually and conclusively met this testimony by showing that the construction of the elevator rendered it a mechanical impossibility to move the elevator while the doors were open, thus bringing the case within the doctrine of *Kalman v. Pieper,* 158 Wis. 487, 149 N. W. 203, and cases cited in the opinion therein, wherein it is held that a *prima facie* case of negligence grounded upon an abnormal movement of a machine is fully overcome by proof that the machine was in a proper state of repair, and that, under such circumstances, the movement claimed to have resulted in injury could not have occurred. This contention would have to be accepted if it were not for the further evidence in this case that the elevator would move up or down by use of the electric button located beneath the glass covering. True, Kaestner, the operator of the elevator, and Rutzen, the engineer and electrician for the defendant company, testified that the glass covering was in proper position at the time of the accident. Whether it was or not depends upon the truth of their testimony. If the testimony of the plaintiff and Mrs. Stockman be true, it is reasonably certain that the glass covering was not in proper position. On the other hand, if the glass covering was in proper position, the testimony of the plaintiff and Mrs. Stockman to the effect that the elevator was moved while the doors were open, is untrue. We can see in the case nothing but a clear question of veracity between the witnesses who say that the elevator moved while the doors were open and those witnesses who testify that the

glass covering was in its proper position at the time of the accident. The question of which are to be believed is for the jury. The court is not acting within its proper judicial province when it directs a verdict under such circumstances.

By the Court.—Order affirmed.

WISCONSIN ASSOCIATION OF MASTER BAKERS and others vs. WEIGLE, Dairy and Food Commissioner.

May 4—June 19, 1918.

Constitutional law: Police power: Licensing of bakeries: Classification: Validity: Equality: Discrimination: License fees: Exemption of part of licensees.

1. Assuming that ch. 648, Laws 1917 (secs. 1410*d*—1 to 1410*d*—8, Stats. 1917), relating to the regulation and licensing of bakeries and other similar establishments, is an exercise of the police power in the interest of the public health, and that the prescribed license fees are not exacted for revenue purposes but merely to meet the expense of licensing and supervising such establishments, it is *held* that the amount of baking surface operated is a proper basis for a classification of bakeries, such as is made in sec. 7 of the act (sub. 2*a*, sec. 1410*d*—6, Stats. 1917), which fixes at $5 the license fee for operating a bakery having more than twenty and less than fifty-one square feet of baking surface, and at $10 the fee for a bakery having fifty-one or more square feet of baking surface.
2. A classification made by the legislature upon a proper basis cannot be held invalid, even though a more just classification may be suggested, unless it is clear beyond a reasonable doubt that there are no legitimate reasonable grounds for the classification made.
3. In the exercise of the police power of the state the legislature is limited by the constitutional provision that restraints and burdens imposed shall affect all persons equally; but persons and property may be separated into classes, provided they have characteristics legitimately distinguishing the members of one class from those of another in respects germane to some general public purpose.

4. The licensing and inspection of all bakeries being required, in the interest of public health, by the act of 1917, the legislature had power to classify bakeries and determine the amount of license fees to be paid in each of the respective classes, but had no power to exempt a part of the licensees from the payment of any fee and thus cast the whole burden upon the nonexempted classes. Hence sec. 7 of the act, fixing the license fees to be paid by bakeries in the other classes, but wholly exempting from any such payment all bakeries operating less than twenty square feet of baking surface, is invalid.

THIS is a proceeding brought under the original jurisdiction of this court praying for a writ of *mandamus* to compel the dairy and food commissioner of the state of Wisconsin to issue to the petitioners and those similarly situated licenses in accordance with the law without payment of the fee prescribed by ch. 648, Laws 1917, the purpose of this proceeding being to test the constitutionality of sec. 7, ch. 648, Laws 1917. The original petition has been twice amended. In the statement of facts the petition will be treated as if originally filed as now amended, without further comment as to the amendments. Without attempting to set out all the purely formal matters alleged in the petition, the material facts are as follows: That the individual petitioners and the members of the *Wisconsin Association of Master Bakers* which operate bakeries in this state are required by the terms of sec. 7, ch. 648, Laws 1917, to pay a fee to the state for a license to operate such bakeries, and that unless such fee is paid the license required by the laws of this state to operate a bakery cannot be procured and petitioners will be liable to criminal prosecution and punishment; that many of the individual members of the *Association,* petitioner, bake ice-cream cones, and by the terms of said chapter are required to pay a further license by reason thereof; that some of the individual members of the *Association,* in addition to operating a bakery, are engaged in baking macaroni, manufacturing candy and ice cream for wholesale trade, manufacturing candy and ice cream for their own retail

trade, and conducting a lunch counter for their own retail trade, manufacturing pop and soda water for retail trade, and that for carrying on these businesses they are also required to procure a license; that respondent is the dairy and food commissioner of the state of Wisconsin and as such is charged with the duty of enforcing the provisions of ch. 648, Laws 1917, and of prosecuting any persons who conduct a bakery business without first procuring a license therefor; that 125 baking establishments operate 20 square feet or less of baking surface each; that 88 baking establishments operate more than 20 and less than 51 square feet of baking surface each; that 450 operate more than 51 and less than 100 square feet of baking surface each; that 375 operate more than 100 and less than 150 square feet of baking surface each; that 45 operate more than 150 and less than 400 square feet of baking surface each; that 23 operate more than 400 and less than 1,000 square feet of baking surface each; that 2 operate more than 1,000 and less than 1,500 square feet of baking surface each; that 5 operate more than 1,500 square feet of baking surface each.

(a) That the aggregate annual expenditure for bakery and confectionery license and regulation by the state commission administering the bakery and confectionery license and regulation law, immediately prior to the enactment of ch. 648, Laws 1917, was about $3,500, apportioned approximately as follows, as to the bakeries:

(1) For bakeries operating less than 20 square feet of baking surface, $1 each.

(2) For bakeries operating more than 20 and less than 51 square feet of baking surface, $2 each.

(3) For bakeries operating more than 51 and less than 100 square feet of baking surface, $3 each.

(4) For bakeries operating more than 100 square feet of baking surface, $5 each, and $2 additional for each baking device more than one.

(b) There are operated in the state of Wisconsin in the

bakeries subject to the bakery license and regulation law the following baking devices:

(1) Eight baking devices of between 400 and 500 square feet of baking surface.

(2) Six baking devices of between 300 and 400 square feet of baking surface.

(3) No baking devices between 150 and 300 square feet of baking surface.

(4) Four hundred baking devices of between 80 and 150 square feet of baking surface.

(5) The balance of the baking devices operated are of less than 80 square feet of baking surface.

The petition also sets out in detail the facts and circumstances as to the operation of other business jointly with the baking business, such as the baking of macaroni, manufacture of ice cream, confectionery, and other edibles, which in the view we take of this case are not material here.

It is also alleged that "the license fees required to be paid by bakeries of the state by the terms of ch. 648, Laws 1917, are calculated only to meet the expense of licensing and supervising the bakeries and confectioneries enumerated in ch. 648, Laws 1917, and the aggregate of the license fees that would be paid by the bakeries and confectioneries of the state under the terms of said ch. 648 would only equal the expense contemplated by the said law. Inspection service is rendered in and regulatory supervision exercised over bakeries and confectioneries in the state, independent of the number of square feet of baking surface, by public health officers as well as by the bakery inspector and other representatives of the state dairy and food commission. The license-fee provisions of said ch. 648 were designed as a police measure and not as a tax measure." The petition further alleges that the danger to public health arising from the operation of bakeries is in proportion to the number of square feet of baking surface.

Upon the filing of the petition an alternative writ was issued

requiring the respondent to issue to each of the petitioners, and to all others similarly situated, a license to operate a bakery and other licenses referred to in said petitions, without the payment of the license fees provided by ch. 648, Laws 1917, and that in default thereof he show cause before this court why he has not done so. The matter was continued by stipulation. There was subsequently, on the part of the respondent, a motion to quash the alternative writ, on the ground that neither the petition nor the alternative writ states facts showing that any of the parties are entitled to the writ of *mandamus* as prayed. Upon such motion the matter was argued orally to the court and briefs presented by counsel on both sides.

For the petitioners there was a brief by *Crownhart & Wylie* of Madison, and oral argument by *F. M. Wylie* and *C. H. Crownhart.*

For the respondent there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ROSENBERRY, J. Prior to the passage of ch. 648, Laws 1917, except as to the payment of license fees, the law regulating bakeries and providing for the inspection thereof and other establishments referred to in the petition was substantially as it now is. It is not claimed that the law as it stood prior to the enactment of ch. 648, Laws 1917, is unconstitutional or void. The law has been before this court in *State ex rel. Ohlenforst v. Beck,* 139 Wis. 37, 119 N. W. 300, and in *Benz v. Kremer,* 142 Wis. 1, 125 N. W. 99, and in the aspects there considered has been upheld as a constitutional exercise of the police power of the state. That part of the law now assailed is the provisions of sec. 7, ch. 648, being sub. 2*a,* sec. 1410*d*—6, Stats. 1917:

"The license fee for establishing or operating a bakery shall be five dollars for every bakery equipped with a stove or stoves,

oven or ovens, or other baking device or devices having more than twenty square feet and less than fifty-one square feet of baking surface, and ten dollars for every bakery equipped with a stove or stoves, oven or ovens, or other baking device or devices having fifty-one or more square feet of baking surface. No fee shall be required for the use or operation of a stove, oven or other baking device having less than twenty square feet of baking surface; five dollars for every cone bakery and every macaroni bakery; ten dollars for every confectionery establishment manufacturing candy or ice cream for wholesale trade; two dollars for every confectionery establishment manufacturing candy or ice cream for their own retail trade only."

In the consideration of the questions raised here we assume that the whole law is an exercise of the police power in the interest of the public health; that the fee required to be paid as a condition of procuring the license is not exacted for the purpose of revenue, but that its object is the reimbursement of the state for licensing and the supervisory service rendered under and pursuant to the law.

It is argued that the classification made by the subsection in question is not based upon distinctions germane to the purpose of the law and that it is arbitrary and unjust.

We must hold that the amount of baking surface operated by each establishment is a proper basis of classification. For aught that appears in this case no more just basis of classification could be adopted. While in individual cases the amount of baking surface operated may not bear an exact ratio to the amount of business done, still it is doubtless as accurate and fair as any basis of classification that could be adopted, particularly when the admitted fact that the menace to the public health is in proportion to the number of square feet of baking surface operated by each bakery is considered. The legislature having adopted a proper basis of classification, we cannot say that the classification made offends any constitutional provision, unless we can say that no argument or considera-

tion of public policy exists which could have weight with a reasonable and honest man in making the classification adopted; for if such reason or argument does exist, the weight or sufficiency of it is not for the courts, but is for the legislature. We cannot assume that no legitimate and adequate reasons exist for the classification made. It is only when it is made to appear clear beyond reasonable doubt that there are no just arguments or considerations of public policy which exist upon which the classification may be based that the court can declare the act of the legislature unreasonable in a legal sense and therefore void. *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561.

The provision in question may be subjected to many valid criticisms; many weighty arguments may be directed against it, and a classification much more likely to do justice may be suggested; but these are matters which are properly for the consideration of the legislature, and we cannot say that in this case it is clear beyond a reasonable doubt that there are no legitimate reasonable grounds for the classification made.

It is argued that, even if the classification be upheld, the exemption of part of the licensed class from the payment of any license fee is discriminatory. This contention is sound and rests upon the most elementary principles. In the exercise of the police power of the state the legislature is limited by the constitutional provision that restraints and burdens imposed shall affect all persons equally. Sec. 1, art. I, Const. Wis.; sec. 1, Amend. XIV, Const. U. S.; *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468. Uniformity and equality under the constitution of the United States as well as of the state of Wisconsin are so construed as to enable a practical application to be made in the conduct of governmental affairs. The rule permits the separation of persons and of property into classes, provided they have characteristics legitimately distinguishing the members of one class from those of another in respects germane to some general public purpose. *State ex rel. Kel-*

logg v. Currens, 111 Wis. 431, 87 N. W. 561; *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468.

Having in the exercise of the police power declared that all bakeries in the interest of the public health should be licensed and that a fee for such licensing should be exacted to cover in whole or in part the cost of licensing and supervision, upon what principle can it be said that a part of the licensed class can be wholly exempted? Such a provision clearly offends against the rule of equality. While it is within the province of the legislature within established rules to make classifications and subclassifications and to determine the amount of fees to be paid by each of the respective classes and subclasses, it is nevertheless beyond the power of the legislature to wholly exempt a part of the licensees and cast the whole burden upon the nonexempted subclasses.

If the legislature had said that those bakeries which came within the definition of the exempted class did not require inspection and licensing and thereby had exempted them from licensing and inspection as well as the payment of the fee, it would have acted wholly within the constitutional field; but having said that in the interest of the public health bakeries operating less than twenty square feet of baking surface do require licensing, inspection, and supervision, and having declared that the licensed class shall bear the expense of licensing and inspection, it cannot wholly exempt a part of the licensees and cast the whole burden upon the nonexempted subclasses. Such a provision is clearly arbitrary and discriminatory.

While the legislature has a wide discretion acting within constitutional limits, its acts are void if they contravene the provisions of the constitution. Although the departure in this case is followed by comparatively slight inequalities, the character of these inequalities, however, is not affected by their size as measured in dollars and cents. Equality before the law is one of the fundamental principles upon which our

institutions rest, and like the virtue of a woman it must be held sacredly inviolate or it does not exist.

We are of the opinion that the exemption of a part of the licensed class from bearing any part of the expense of licensing and inspection renders sec. 7, ch. 648, Laws 1917, void. The remainder of the law having stood substantially in its present form prior to the enactment of ch. 648, Laws 1917, is not affected by this decision and continues in full force and effect.

By the Court.—The motion to quash the alternative writ is denied, and it is ordered that a peremptory writ as prayed for issue. No costs to be taxed.

RODERMUND, Plaintiff in error, vs. THE STATE, Defendant in error.

May 21—June 19, 1918.

Criminal law: Procuring miscarriage: Use of instruments: Intent: Revocation of physician's license upon conviction of crime: Statute construed: Constitutional law: Evidence: Relevancy: Opinions: Harmless errors.

1. The conviction of a physician of the offense of having used instruments in the treatment of a pregnant woman with intent to procure a miscarriage, is *held* to be sustained by the evidence.
2. It is immaterial in such case, under sec. 4583, Stats., whether or not a miscarriage was in fact procured, if the instruments were used with intent to procure a miscarriage.
3. Upon conviction in such case a revocation of the defendant's license to practice medicine and surgery was properly adjudged, under sec. 1435*i*, Stats. That section does not provide for an additional criminal punishment, constituting cruel and unusual punishment within the meaning of sec. 6, art. I, Const. It merely provides that the court shall do directly and forthwith in the criminal proceeding what might be done in subsequent civil proceedings.
4. The word "shall" in said sec. 1435*i*, Stats., is mandatory, the legislative intention being that a criminal conviction shall be con-

clusive as to the unfitness of the licensee to continue in the practice of his profession.

5. The term "crime," as used in sec. 1435i, Stats., embraces the violation of any penal law of the state, and includes all felonies and misdemeanors under the law of the state committed by the offender "in the course of his professional conduct."

6. In a prosecution under sec. 4583, Stats., for using instruments in the treatment of a pregnant woman with intent to procure a miscarriage, evidence that defendant was instrumental in not having the woman taken to a hospital for care and treatment was relevant and was properly received; and another physician, who examined and treated the woman after defendant had had her in charge, was properly permitted to give his opinion, based on her condition and age, that a miscarriage does not often occur in such cases unless artificial means are employed.

7. In such a case the admission in evidence of a statement made by the woman to her sister in the absence of defendant, concerning her visit to the defendant's office, having relation only to facts which were practically uncontroverted and appeared by other evidence in the case, is *held* not to have been prejudicial error.

ESCHWEILER and KERWIN, JJ., dissent.

ERROR to review a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The plaintiff in error (hereinafter called defendant) was convicted of the offense of having used instruments in the treatment of a pregnant woman with intent to procure a miscarriage, as denounced by the provisions of sec. 4583, Stats. The circuit court sentenced the defendant by the imposition of a fine and the costs of the action, and in default of the payment of such fine and costs committed him to the county jail for a period not to exceed six months.

King M. Bacon of Madison, for the plaintiff in error.

For the defendant in error there was a brief signed by the *Attorney General, Harry Sauthoff,* district attorney for Dane county, and *J. E. Messerschmidt,* assistant attorney general; and the cause was argued orally by *Mr. Sauthoff* and *Mr. Messerschmidt.*

SIEBECKER, J. The defendant insists that the trial court erred in submitting the question of his guilt or innocence to

the jury, and claims that the evidence does not sustain the charge preferred against him of having used and employed instruments upon the person of a pregnant woman with the intent to produce a miscarriage. Upon the motion of the accused for a new trial the trial court declared that "during the trial the testimony satisfied the court of the guilt of the defendant beyond a reasonable doubt . . . The court has also examined the evidence in the case in the light of the argument made in defendant's brief and the statements made in the oral argument. The court has read all of the cases cited by the defendant. After this study of the case it is still the solemn opinion of the court that the evidence establishes the guilt of the defendant beyond all reasonable doubt."

The evidence adduced shows that the defendant was on July 27, 1917, consulted for treatment by an unmarried woman of the age of twenty years who had been pregnant for a period of from two to three months. The defendant testified that the woman was then in a cyanosed condition and in a critical state of health which he attributed to her having taken a large quantity of Chichester pills, and that he agreed to give her medical treatment. The evidence of the woman tends to show that defendant at this interview consented to treat her upon condition that she pay him $50 in advance and that there was some conversation as to the necessity of preventing publicity of the fact of her condition and his treatment of her under these circumstances. The defendant testifies that whatever was said by him on the subject was in response to her request to protect her in her unfortunate situation, while the woman's testimony is in substance that defendant suggested absolute secrecy for his protection against unjust prosecution for rendering her medical aid and assistance in her affliction. By appointments the woman called at defendant's office on the third day after the first interview and paid him $50, or $35 as defendant testifies. She made a third call three days after the second one. On both of these last occasions defend-

ant used instruments upon her. The woman is unable to state what they were, but testifies that the use of them caused her pain, followed by menstruation; that she went about for three days after the first treatment without much pain or inconvenience, but that the last treatment was accompanied and followed by severe pain and consequent weakness and confinement to her bed. The defendant was called to her bedside on the day after the second treatment, at the home where the woman's sister was employed as a domestic, and was requested by the sister's mistress to remove the woman to a hospital. Defendant removed her from this place to a room in a private home of one of his friends who had cared for some of his patients theretofore. The defendant claims he did this because he had had trouble at the two available hospitals regarding his patients, and that the room in the private home was a comfortable and appropriate one for her care and would not expose her condition to the publicity which would follow had he taken her to a hospital. Two days thereafter the woman was taken to a hospital without the consent or knowledge of the defendant and there received treatment from another doctor and hospital care for about one week. The doctor employed to attend her at the hospital testifies, in substance, that he performed an operation of curettement on her (which was on the third day after the last treatment defendant gave her at his office); that he removed the placenta, found no fœtus, and from appearance it was his opinion that pregnancy had existed from two to three months; that he could not state whether or not the fœtus had been expelled by artificial means; that the use of a speculum and tenaculum forceps in treatments of a pregnant woman would not produce abortion; that he did not know whether this miscarriage was produced by drugs or other means; and that if the woman was in the condition testified to by the defendant when he treated her it would indicate that a miscarriage was then in progress. The defendant testified in substance that he found the woman in process of

miscarriage, that he rendered proper medical aid for such condition, that he did nothing to produce a miscarriage, that his treatment of her was for alleviating her serious condition and to protect her life, that he did nothing to prevent publicity of his connection with or treatment of her case aside from what proper professional conduct demanded of him in compliance with her wishes, that all of his professional services were rendered for the purpose of giving her proper medical care, and that he had no intent to do anything to procure a miscarriage.

To ascertain the true significance of all the facts and circumstances shown by the evidence requires a consideration of it in all its details that cannot be fully restated here. The proper inference from the evidence is necessarily dependent upon the credibility and weight which is given to the statements of the various persons who testified. The case is therefore one where the jury and the trial court, who saw the witnesses on the stand and observed them while testifying, could much better ascertain the probative force of the evidence than can be ascertained by a review of the printed record. The facts and circumstances shown are, as to their significance and the inferences to be drawn therefrom as to defendant's guilt or innocence, peculiarly within the function to be exercised by the triers of fact. The offense charged involves the inquiry, With what intent did the defendant give this woman the treatment he testified to? Such intent is a fact which must be ascertained from a consideration of the facts and circumstances which throw light on defendant's conduct and acts. If he had the felonious intent of producing a miscarriage, then guilt is established though he did not in fact procure a miscarriage. An attentive study of the evidentiary facts in all their bearing upon defendant's acts in relation to the charge preferred against him has persuaded us of the correctness of the conclusion of the jury and trial court. We are of the opinion that the evidence amply justifies and sustains

the verdict of the jury and the judgment of the trial court and that the record establishes the defendant's guilt.

It is urged that the court erred in applying the following provision of sec. 1435*i*, Stats., and adjudging a revocation of defendant's license to practice surgery and medicine:

"... If any person licensed or registered by said board shall be convicted of any crime, committed in the course of his professional conduct, the court in which said conviction is had shall in addition to any other punishment imposed pursuant to law revoke said license or certificate."

It was held in *State v. Lewis,* 164 Wis. 363, 159 N. W. 746, that the effect of this statute "is simply to give, as an incident to such conviction, power to the court in the criminal proceeding to do directly and forthwith what might be done in subsequent civil proceedings." We are persuaded that this interpretation of the statute is correct, and hence the contention of the defendant that it provides additional criminal punishment and that it constitutes cruel and unusual punishment is without merit. The term "crime" as used in this provision was manifestly employed to embrace the violation of any penal law of the state, and clearly includes all felonies and misdemeanors under the law of the state committed by the offender in the course of his professional conduct. The terms of the statute leave no room for different interpretation of the word "shall" in the provision that the court, upon record of conviction, "shall" revoke the license or certificate of the person convicted. It is apparent that the legislature intended that a criminal conviction of any such licensed or registered person shall be deemed to be a conclusive test of unfitness of such person to further continue in the practice of his profession and made it mandatory on the court to revoke such license. This is properly a legislative question. "The nature and extent of the qualifications required must depend primarily on the judgment of the state as to their necessity." *Dent v. West Virginia,* 129 U. S. 114, 9 Sup. Ct. 231; *State v. Schaeffer,*

129 Wis. 459, 109 N. W. 522; *Hawker v. New York,* 170 U. S. 189, 18 Sup. Ct. 573.

An exception is urged to the court's additional and unrequested instruction to the jury upon their return to the court room after having deliberated on the case twenty-four hours, upon the question of the defendant's use of instruments to produce a miscarriage. The court stated to them:

"You are not concerned upon that branch of the case with the question of whether he did actually produce a miscarriage or not. The question is: 'Did he use these instruments with the purpose and with the intent of producing a miscarriage.'"

The instruction embodies a correct statement of the law applicable to the case and was given in a proper manner and on an appropriate occasion. The record discloses nothing to indicate that the defendant could have been prejudiced thereby in any respect. The record also shows that the court accorded defendant's counsel full privilege to present the grounds upon which it is claimed the evidence fails to sustain the verdict in the case and to submit a brief on the question.

Evidence was received tending to show that the defendant was instrumental in not having the woman taken to the hospital for care and treatment; and Dr. Sommers, who examined and treated the woman after defendant had had her in charge, was permitted to give in evidence his opinion, based on her condition and age, that a miscarriage does not often occur in such cases unless artificial means are employed. This evidence was relevant to the issues being tried and tended to aid the court and jury in determining the facts at issue. No grounds are shown indicating that its reception was prejudicial to the defendant.

The reception in evidence of a statement made by the woman to her sister in the absence of defendant, concerning her visit to the defendant's office, relates only to the fact that she had visited defendant to secure treatment for relief concerning her menstrual troubles. This evidence deals with

facts that stand practically uncontroverted and appear by other evidence in the case. Under the circumstances we perceive no prejudicial effect of these statements so given in evidence by the sister on defendant's rights. We have examined the other exceptions to rulings on evidence and find the record free from prejudicial error in the light of provisions of sec. 3072*m*, Stats., and the following cases: *Oborn v. State,* 143 Wis. 249, 126 N. W. 737; *Schumann v. Kaukauna,* 163 Wis. 396, 158 N. W. 71; *Radej v. State,* 152 Wis. 503, 140 N. W. 21.

The proceedings on the trial disclose that the accused had a fair trial, and the judgment of the circuit court must stand.

By the Court.—The judgment is affirmed.

ESCHWEILER, J. (*dissenting*). A consideration of the record convinces me that the testimony falls short of measuring up to the salutary rule that it should exclude a reasonable doubt as to defendant's guilt.

The unfortunate girl in this case had commenced taking pills for the avowed purpose of starting menstruation, and that meant, beyond question, an abortion. She had had pains and been sick, for a day or two at least, before her first visit to defendant, and on the preliminary examination she said that she went to his office to get help to relieve her from the pain she was in. The physician who subsequently attended her at the hospital testified for the state and said that if a miscarriage was in process even at that early stage of pregnancy it would be accompanied by labor pains.

There is an entire absence of any evidence as to when the fœtus was expelled, and it is therefore mere conjecture that it happened subsequent to any examination or treatment by the defendant. If it was before, then of course at the time she visited him she was not pregnant, within the terms of the statutes.

The physician who removed parts of the afterbirth, or

placenta, testified in answer to a question as to whether the condition he then found was due to natural processes: "That would be hard to say, except if I may qualify the statement that miscarriage or abortion does not often happen unless something has been done to force it." By that is meant—"artificial means." The following question was asked him and answer made on redirect examination: "Counsel for defense has asked you as to whether or no abortion or miscarriage may occur as a result of falls and bumps and jars or excessive intercourse. Would you judge from your examination in this case and your experience in regard to cases of a similar nature that that was true in this case? *A.* I couldn't tell that."

There does not seem to be a sufficient foundation in this case upon which a verdict of guilty should stand, and it is because it has been clearly declared by the legislature, by sec. 4719, Stats., as well as such decisions as *Prinslow v. State,* 140 Wis. 131, 121 N. W. 637; *Abaly v. State,* 163 Wis. 609, 158 N. W. 308; *B—— v. State,* 166 Wis. 525, 166 N. W. 32; *Kuhl v. State, ante,* p. 495, 167 N. W. 743, that in such cases of vital importance to a defendant he is entitled to the deliberate opinion of the court of last resort upon the facts as well as the law, that I am impelled to register this dissent.

KERWIN, J. I concur in the foregoing dissenting opinion of Justice ESCHWEILER.

OWEN, J., took no part.

DELVAUX, Appellant, vs. KEWAUNEE, GREEN BAY & WESTERN RAILWAY COMPANY, Respondent.

April 3—July 8, 1918.

Railroads: Injury to boy on track: Cause of accident: Contributory negligence: Questions for jury: Changing answers in special verdict: Appeal: Reversal.

1. In an action against a railway company to recover for loss of services of plaintiff's son, caused by injuries, notwithstanding testimony that at the time of the accident the boy had climbed upon a moving car, it is *held* that there was credible evidence sufficient to sustain findings by the jury to the effect that he was run over while crossing the track between the forward cars of a freight train and a rear-end section which, having been uncoupled while the train was still moving, continued in motion; that the proximate cause of the injuries was defendant's negligence in failing to give warning to the boy of the approach of the rear-end section; and that there was no contributory negligence on the boy's part.
2. Although on appeal great weight is to be given to a decision of the trial court changing answers in a special verdict, yet where the verdict as rendered is supported by credible evidence such changes are unwarranted and a judgment based on them must be reversed.

APPEAL from a judgment of the circuit court for Brown county: W. B. QUINLAN, Judge. *Reversed.*

The appeal is from a judgment changing the answers of a special verdict and granting judgment for defendant.

This action is brought by the plaintiff to recover for his expenses and the loss of services arising from an injury to his son Ernest in being run over by a freight car of defendant on its tracks in the city of Green Bay, Wisconsin, May 5, 1914. Another action was started on behalf of the son to recover for his injury arising from the same accident and was tried in November, 1914, before the Hon. HENRY GRAASS, circuit judge, who set aside a special verdict upon which judgment might consistently have been rendered in

favor of the plaintiff in that action, and judgment for the defendant was entered. On appeal to this court, and by a divided court, such judgment was affirmed, 161 Wis. 554, 154 N. W. 380.

On the trial of this case in May, 1916, by a special verdict the jury found as follows:

(1) Defendant's brakeman uncoupled the rear-end section of the train while the train was still in motion;

(2) That after such uncoupling the rear-end section continued in motion;

(3) That Ernest Delvaux was run over and injured by the rear-end section;

(4) That the defendant company failed to exercise ordinary care in that it did not give a warning to the boy of the approach of the rear-end section;

(5) That such failure was the proximate cause of the injuries;

(6) That no want of ordinary care on the part of Ernest proximately contributed to his injuries;

(7) That $2,500 would reasonably compensate the plaintiff herein for his loss.

On appropriate motions the trial court, after a full discussion of the testimony in the case, held that there was contributory negligence by the boy, and that the evidence to sustain plaintiff's theory as to defendant's negligence is so incredible and unreliable and so opposed to the physical facts established by uncontradicted evidence in the case that the verdict cannot stand; and thereupon directed that the answers to each of the respective questions other than the last in the special verdict should be reversed and the assessment of damages should be stricken out, and that upon the verdict so changed the defendant should have judgment. From the judgment thus entered the plaintiff has appealed to this court.

M. E. Davis of Green Bay, for the appellant.

For the respondent there was a brief by *Greene, Fairchild, North, Parker & McGillan* of Green Bay, and oral argument by *H. O. Fairchild.*

The following opinion was filed April 30, 1918:

ESCHWEILER, J. The plaintiff contends that under the evidence in this case the following are the facts:

That Ernest, the injured boy, then about nine years and three months old, with his brother George, about a year and seven months older, and a boy, Lawrence Van Husen, about nine years old, were playing near a stone pile alongside defendant's tracks throwing stones into a marsh on the other side of the track as a freight train from the west came by them; that a member of the train crew came from the forward end of the train, passed by them as they were at the stone pile, went towards the rear end and separated the two sections, leaving the rear one with about six freight cars and the caboose; that the forward end then pulled out towards the east and the boy Lawrence ran across the track between the two sections, and that Ernest, while watching the forward end of the train pulling away, followed him without noticing that the rear section was still in motion, and as he was between the rails his brother George hollered to him, he hesitated, and was struck and run over by the wheels of the front truck only of the front car of that rear section, and that the rear section then came to a stop; that he crawled out a distance of at least twelve to thirteen feet and lay down between the rails of a track parallel with the one on which he was injured; that there was no one on the front end of the rear section to give any warning of its approach; that the right leg was crushed below the knee, requiring amputation, and that all the toes save the little one on the left foot were so crushed and injured that they also were required to be amputated. The right foot was not injured.

We find nothing so incredible or impossible in the recital given by these boys as to have justified the court below, had there been no further evidence in the case, in determining as a matter of law either that there was no negligence on the

part of the defendant or that there was contributory negligence on the part of the boy.

Defendant's claim is that as the freight train came in by the stone pile Ernest climbed on one of the moving freight cars and before the sections were separated, and while so riding slipped, bringing his left foot upon the top of the rail, and so received his injuries.

To sustain defendant's version, or at least to contradict plaintiff's version, defendant contends that in addition to the testimony of the boy Lawrence Van Husen as an eye-witness, to the effect that the boy Ernest did climb upon a moving car, there must be considered, under the testimony in this case, to have been established as verities the following:

(1) That portions of the toes of the injured boy were found, within half an hour after the accident, pressed against the edge of the top or ball of the rail and hanging from there down on the inside of the south rail on the curved track; that the first joint of the big toe was intact, a toe nail plainly visible on that joint and on each of the next two toes, indicating, as claimed by defendant, that the boy's foot must have slipped while riding on the car.

(2) That the toes were found three to five feet ahead of the front wheels of the rear section, thereby indicating that the accident must have been caused by some car ahead of such section and therefore not as claimed by plaintiff.

(3) That the accident happened about forty-three feet east of the stone pile and not about opposite it, as claimed by plaintiff.

(4) That the train had not been separated before the boy was injured.

(5) That while the injured boy was being cared for, just after the injury, his brother George, in his presence, stated that the injury occurred by reason of Ernest trying to catch a ride.

It is frankly conceded by defendant's counsel that the

testimony of Lawrence Van Husen is to some extent mistaken. He testified positively that as the train passed the stone pile each of four boys climbed on four several cars as they passed by, the injured boy first, and Lawrence on the last one; that he, Lawrence, rode at least two car lengths east of the stone pile and that Ernest was still on at that time. This would have placed Ernest at least six car lengths east of the stone pile or at least 200 feet east of where the toes were claimed to have been found on the rail, and manifestly irreconcilable on that point with either plaintiff's or defendant's version of the accident.

From his cross-examination on this trial it appears that he testified on the trial of the boy's case that while they were at the stone pile he saw the brakeman go past them on his way to the rear end of the train, thus corroborating the two Delvaux boys on that detail.

As to the first of the alleged verities, viz. the condition and appearance of the toes as found on the track, this condition of the toes as described by the witnesses, showing that the first joint was intact and the skin pressed so tightly on the rail that it apparently kept the blood within the joint, giving it a purplish appearance, may be as well if not better reconciled with plaintiff's version than with defendant's, for several reasons.

If Ernest slipped from a moving car it must have been several car lengths ahead of the sixth car, the one which made the head end of the rear section. Maddy, the rear brakeman, testifies that while the train was in motion he was passing on top of the car from the caboose towards the sixth car, where he expected to make the cut, and when on about the fourth car from the rear end he heard a boy scream; he then proceeded forward, and was just getting down from the sixth car as the train stopped and he saw the boy on the sidetrack at least twelve feet away and just opposite where the cut was made.

Manifestly, then, with the train in motion, the car causing this injury must necessarily have been passing along towards the east after running over Ernest for the period while Maddy was walking along the top of the two cars and then for a sufficient length of time at least to permit the injured boy to crawl out from that track across the intervening space to the place where he was found; if it be so, it necessarily follows that several sets of wheels had passed by the point where the severed toes were attached, as claimed, to the rails, and it would be well within the jury's field of reasonable probability to consider that such other wheels would have either scraped those toes off from the ball of the rail or crushed them to pulp, and that if but one set of wheels or but one wheel had passed over the toes, as claimed by plaintiff, they might more reasonably have been expected to be found in the condition indicated in the testimony.

In this connection it may also be noted that it would be a fair consideration for the jury, in attempting to reconcile the many apparently contradictory facts in this case, whether or not, if the boy had slipped from the cars still in motion, he would, in his injured condition, have had presence of mind enough and time enough to crawl out from under the moving cars and drag the balance of his wounded right leg across the rail in the brief interval that would have elapsed between his injury from one set of wheels before the next set of wheels on that moving train reached him. The testimony as to the nature of the injuries pretty clearly demonstrated that there had been no second running over of this boy by another set of wheels.

Again, if it be correct that the toes were but three to five feet ahead of the sixth car where it stopped as Maddy got down, it could not have been the car just ahead of Maddy, as that car was stopping at the same time, and then Ernest would necessarily have been under that car, or at least crawling to the other track, as Maddy was descending. So that it

would be a legitimate inference from the testimony that several cars at least had passed over the fragments of toes before the train came to a stop, on defendant's theory of the case.

On the second point, of finding the toes three to five feet ahead of the front wheels of the rear section: At the time these toes were picked off the rail by Mr. Smith, superintendent and claim agent of defendant, apparently no suggestion had been made to any one that it would be claimed on behalf of the plaintiff that the injury was caused by the forward truck of the rear section of the train rather than by any other portion of the train. Maddy, the brakeman, the only one who knew all the circumstances in connection with the separating of the train, was not present at the time these toes were so found, nor did he hear of the finding of them until it was testified to in the trial of the first case. No measurements were taken at that time of the position those toes were in with reference to the rear section, and all that was given in that regard was a recollection as to estimates made at the times, and no marks were made on the ground or elsewhere for future identification of the position of the toes and these wheels. Some witnesses recollect that blood stains were plainly visible at this point, others had no recollection thereof; the conductor, Dingman, testified on the first trial that he did not see any blood stains, and on this trial that he did.

It was within the province of the jury to say what weight should be given to the recollection of the witnesses as to the fact of the exact place where these toes were found with the other testimony, including the testimony of the aunt of Ernest that she saw blood on the rail opposite the stone pile the next day. The jury had before them the uncertainty of these same witnesses as to whether blood stains were at the spot where the toes were found, an equally demonstrable fact; they also had before them the testimony of one witness that he saw Mr. Smith carefully blow sand away from these toes before wrapping them up, of other witnesses also there

that they did not see the incident, and may have believed that while some witnesses were certainly wrong in their recollections as to some details they may all have been wrong on a detail which at that time was evidently not considered so important as it has since turned out to be, and the jury in the light of all these circumstances might have believed that there was a mistake as to the exact location with reference to the rear section, without necessarily determining that there was perjury by any, much less all, of such witnesses. The jury are the harmonizers of such conflicts, not the court.

The third point is the so-called physical fact, viz. that the location of the place of the injury was determined by measurement to have been forty-three feet east of the stone pile. But this is not such a physical fact as may be considered of controlling weight in a case of this kind, for the measurement was not taken until some time after the injury, and the point from which the measurement was started towards the stone pile and upon which the value of this evidence must rest was fixed by the recollection of Mr. Smith as to where he found the toes, supported to some extent by the recollection of Mr. Juley as to where he saw the blood spots the morning after the accident between the rails where the boy was picked up.

A certain memorandum appears to have been written as the result of such measurements at about the time they were taken; one copy given to a witness, McNamara, who had been called by Mr. Smith to assist in the measurement, and the other kept by Mr. Smith. Neither of these copies was produced on the trial, and Mr. McNamara on this trial, called as an adverse witness by the plaintiff, admitted that on the trial of the first case he had testified that his recollection was that the measurement from the place where Smith said he had found the toes to the stone pile was thirteen feet instead of forty-three. This would bring it opposite instead of east of the stone pile and corroborates plaintiff's version.

The weight to be given to this testimony as to location may

also have been weakened in the minds of the jury by the conflicting statements made by the brakeman, Maddy, as to where the cut in the train was made; on this trial that it was about forty feet east of the stone pile, and also that he could not then say where except by taking into consideration what somebody had told him, and on a former occasion that it was just about opposite the stone pile or just west or east of it. He also testified that the wounded boy was just opposite where the cut was made. If he was correct in saying that the cut was made just opposite the stone pile, then defendant's witnesses were mistaken in locating the forward end of the rear section forty feet east of the stone pile, or else the rear section did move forward after the cut was made, just as found by the jury. And in considering Maddy's testimony the jury might have considered that the train was an hour late and that Maddy's duty for the day was ended when the cut was made and that he had but six car lengths to go from the caboose, that he left the caboose, as the conductor testified, at a point a mile west of where the cut was to be made, which the jury might have thought gave him time and opportunity to be ahead of the sixth car as the time came for the cut to be made; for if each car was, as testified, thirty-five to forty feet long, he had but to walk 240 feet while the train was going 5,280 feet.

On the fourth point, that the train had not been separated before the accident, considerable stress and importance is laid by defendant's counsel.

It was customary at this place in defendant's yards, with this train, for the engineer, after bringing his train to a stop, to proceed with the forward section after giving what was considered sufficient time for the rear brakeman to make the cut. The cut might be made by pulling the pin and uncoupling the air hose, or it might be made by simply pulling the pin, and, as Maddy says, the air-brake hose was so coupled that it would separate itself on the cars pulling apart. Maddy's testimony is that on getting down from the

sixth car as the train came to a dead stop he turned the angle-cock in the air hose on the rear car of the front section, the effect of which would be to hold the air brakes in the rear section set and beyond the control of the engineer in the engine, so that it would be practically impossible to move the train. Why time was taken to turn this angle-cock instead of simply pulling the pin, which would have been sufficient to have allowed the operation of moving the forward end of the train to be done as usual and perhaps would have taken no appreciable length of time more than setting the angle-cock, does not appear. Apparently there was no need of holding the forward end of the train on account of the accident, as the injury had already occurred according to Maddy's testimony, and he does not thereafter appeal for help to or notify of the accident the engineer, fireman, and front brakeman, who were riding in the engine at the time. The engineer had difficulty in starting the train at that time. He testified that owing to the curve he had no way of knowing whether he was connected with the whole train or not at the time he started it. It was not customary to wait for signals from the rear brakeman to the effect that the cut had been made before starting ahead. He found it was necessary to make three pulls, as they are called, before the train could be started, by backing up slowly to gather slack and then pulling forward with the slack. His testimony is that one of such operations of so backing down and pulling forward on the slack took ten to twelve seconds, but he does not testify directly as to the length of time that was consumed that particular evening. The conductor, however, testifies that he was in the caboose at the time the stop was made and there was an interval of at least five minutes before the forward section pulled out. Under Maddy's testimony there was considerable length of time during which he was looking for assistance for the boy before he came back to the train and pulled the pin, thus making the cut.

Several witnesses testify quite positively that the train was

not separated when they came there and saw the boy lying between the tracks. But all these were circumstances proper for the jury to weigh and consider and we cannot on this record override their determination.

The fifth and last point is that from the testimony of one witness who had not been called on the trial of the first case it appears that he came up to the injured boy as he was lying between the rails on the parallel track, and that then his brother George said that the thing happened through their trying to catch a ride. This was denied by both George and Ernest and was clearly a question of fact for the jury to pass upon, and cannot control.

We feel that we have perhaps dwelt more on the questions of fact here involved than might be necessary for the disposition of this case and much more, certainly, than will be of value in any future case; but in view of the history of this matter and the disposition made upon the same state of facts by two learned trial judges to whose opinions we give great weight and consideration, we have felt it proper to explain thus at length the views we reached upon a consideration of the same evidence.

We are not unmindful of the rule that has been established by this court in disposing of such situation in recognizing the great weight to be accorded to the decision of a trial court (*Kuchler v. Milwaukee,* 165 Wis. 320, 162 N. W. 315), and the further rule that must control both the trial court and this court in the consideration of the weight to be given to the determination of questions of fact by the trial jury in order that the constitutionally protected right of litigants to have issues of fact determined by twelve good men and true from the vicinage may be preserved inviolate and in all its original vigor. *McKnelly v. American Yeomen,* 160 Wis. 514, 152 N. W. 169.

But when, as here, from a consideration of the record before us we feel satisfied that there was credible evidence

upon which the jury could arrive at their verdict, the action of a trial court in disregarding such determination is clearly wrong and must be, as it is here, set aside.

It is urged by defendant that in the event of the verdict of the jury being re-established there should be a new trial for alleged errors in rulings on questions of evidence during the trial. We have considered such contention and the suggested errors and do not find that there was prejudicial error against the defendant in the trial of this lawsuit.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions that the verdict of the jury should be reinstated and judgment should follow thereupon in favor of the plaintiff.

WINSLOW, C. J., and VINJE and ROSENBERRY, JJ., dissent.

A motion for a rehearing was denied, with $25 costs and costs of motion, on July 8, 1918.

EWIG, Administratrix, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

April 8—July 8, 1918.

Master and servant: Injury to railway employee while leaving yards: Federal liability act: Questions for jury: When employment ceased: Usual and permitted way for going from work: Crossing tracks: Negligence of employer: Failure to keep lookout on backing engine: Contributory negligence: Assumption of risk: Cause of accident: Conjecture.

1. In leaving the railway yard when his work is done a railway employee is but discharging a duty of his employment and in a legal sense is at work as an employee of the company, provided he is so leaving by the proper and usual way or at least by a

way known to and expressly or tacitly permitted by the employer. So *held* in an action for the death of an engineer, where the parties stipulated that if he was an employee of the defendant at the time of the accident the action was governed by the federal liability act.

2. At the end of his run an engineer turned his engine over to the engine dispatcher and then rode upon it to the roundhouse yard in accordance with his custom, which was not disapproved by the railway company. Before leaving the engine he made out his work report and time slip, cleaned up, and changed his clothes. Sometime later he was found, fatally injured, twisted around the brake-beam of the tender of another engine which had been backing through the yard at a place where employees frequently crossed the tracks in going to and from their work. Upon the evidence, which showed no active objection by the company to such use of the tracks, it is *held* to have been a jury question whether this was a usual and tacitly permitted way to enter and leave the roundhouse yard.
3. The mere fact that the accident did not occur until about an hour after his engine reached the roundhouse yard would not justify a holding, as matter of law, that the deceased had stopped to visit or had turned aside from his duty, it not being shown how long he was occupied as stated on the engine and it appearing that his work report, which apparently he had delivered to the proper employees in the yard, showed that a brake valve needed to be cleaned out, so that he may well have stopped to talk or give suggestions to the roundhouse foreman about that.
4. Although as the other engine was backing through the yard the bell was ringing, the speed moderate, and the method of handling the engine by an engineer alone was the customary method used in the yard, yet, it appearing that the engine was a very large one, with a high tender piled full of coal, and there being evidence tending to show that, for several minutes before the engine started and while it was running 800 feet to the place where it was when the accident was discovered, the engineer had not looked at the south side of the track—the direction from which deceased probably came—except as he was able, sitting as he was, to see it at a distance of 140 feet back of the engine, and that the whole portion of the yard through which the engine was backing was commonly used by employees and others, apparently with the knowledge of and without objection by the company, it is *held* that the question whether there was actionable negligence in failing to keep a proper lookout was one for the jury.

5. Under the federal employers' liability act contributory negligence does not defeat the action, but simply requires that the proportion of such negligence be ascertained and the damages diminished to that extent.
6. Assumption of risk still remains a defense under the federal act, but it does not include risk of unexpected negligent acts of co-employees.
7. In this case the cause of the accident cannot be said to be necessarily mere conjecture, there being evidence tending to show that deceased was struck by the backing engine at a point where there was much travel to and fro and where he would very naturally be crossing the track in leaving the yard.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

The action is to recover damages for the death of John Ewig, a locomotive engineer in the employ of the defendant company, which occurred December 23, 1914, in the roundhouse yard of the company at Milwaukee. A verdict for the defendant was directed at the close of the trial, and from the judgment entered thereon the plaintiff appeals.

It was stipulated at the trial that if Ewig was an employee of the defendant at the time of the accident, then the action should be tried under the federal liability act. The facts were not greatly in dispute and were in substance as follows: John Ewig, the deceased, was a passenger engineer employed for many years by the defendant, residing at Elkhart Lake, Wisconsin, and for about eight months prior to his decease having a run from that point to Milwaukee every day, leaving Elkhart at 7:20 a. m., arriving in the Milwaukee Union depot at 9:15, and returning at 4:15 p. m., reaching Elkhart at 6:35 p. m. After his engine was cut off from the train in the Milwaukee station his duty was to take it to the south track, look it over or inspect it, and then turn it over to the engine dispatcher, who took charge of it and ran it out to the roundhouse yards of the company, three miles and a half west of the depot and very near Merrill Park station. His duty was also to make out a work report stating the con-

dition of the engine and any repairs necessary and a time slip showing the time of the run and the number of hours of work claimed. The work report was for the information of the roundhouse foreman and the time slip for the chief timekeeper, both of whom were at the roundhouse yard. The engineer could deliver these memoranda to the engine dispatcher, or he could, if he chose, remain on the engine, ride out to the yard, and deliver them to the proper employees himself. It appears that Ewig had a brother living on Twenty-eighth street north of and some blocks from the roundhouse yard, and was accustomed to ride out on the engine to the yard and go over to his brother's house for dinner and then come back to the yard in the afternoon and ride down to the station on his engine with the engine dispatcher. This custom was not disapproved by the company. It seems that when he rode to the yard he frequently delivered the time slip and work report himself. He was accustomed also to change his clothes in the engine on the way out to the yard and he kept his clothes and towels in the seat box of the engine. On the day of the accident he came in to the Milwaukee station with his engine at 9:40 a. m., put it on the sidetrack, inspected it, and turned it over to engine dispatcher Vollmer, who took it out to the roundhouse yard. Ewig remained on the engine, made out his work report and time slip, and changed his clothes, but did not give either the report or the slip to Vollmer. Vollmer placed the engine over the cinder pit, near and east of the roundhouse, and left it there with Ewig still in the cab washing his face. Vollmer had received a call to take another engine to the station. No witness testified to having seen Ewig after Vollmer left him up to the time of the accident, which was somewhere near an hour later. Vollmer went to the roundhouse, looked the engine over which he was to take, got the turntable in position, backed out onto the turntable, turned the engine head to the west, and backed up to the water tank to take on water.

The yard extends in a general easterly and westerly direction south of and along the main tracks from Thirty-first street to Fortieth street and is full of tracks. The roundhouse is well toward the west end of the yard, the cinder pit 50 or 100 feet east of it, and the water tank above referred to just north of the cinder pit. The track on which Vollmer took out the second engine runs between the cinder pit and water tank and is at first some 300 feet south of the main track with the intervening space full of tracks. It runs easterly, gradually approaching the main track, and merges in it 1,200 feet or more from the tank and just east of Merrill Park station. Thirty-third street runs north and south and terminates at about this point. Thirty-sixth street terminates north of the water tank, and at this latter point is an elevated viaduct for foot passengers, crossing the network of tracks north of the water tank, but not crossing the track on which Vollmer's engine was standing. After reaching the tank Vollmer got down from the cab, looked over the engine, saw there was nothing wrong with it, then got back on the engine, put in fourteen or fifteen shovels of coal, got up on the window seat on the right-hand (*i. e.* the north) side, started the bell ringing, and started the engine backward. As he moved eastward he looked in that direction from the window of the cab, but in that position a man approaching the track from the south could not be seen on account of the height of the tender, and a man on the south rail would be hidden from view for a distance of 140 feet from the engine, and a man in the center of the track for a distance of 94 feet. The engine backed at the rate of four or five miles an hour for a distance of about 800 feet to a point opposite the coal shed, where Vollmer stopped to get a box of tools or supplies, and the boy who handed the box up told him that there was a man under the tank. Help was gotten and Ewig was found still alive, twisted around the brake-beam of the tender under the trucks nearest the engine. He was gotten out, but died shortly

afterwards without making any statement of the facts of the accident. Marks in the snow indicated that he had been dragged from a point about 350 feet east of the water tank.

For the appellant there was a brief by *William L. Tibbs* of Milwaukee, *Joseph Martin* of Green Bay, and *Willis E. Lang* of Milwaukee, attorneys, and *Daniel W. Sullivan* of Milwaukee, of counsel, and oral argument by *Mr. Tibbs.*

For the respondent there was a brief signed by *C. H. Van Alstine* and *H. J. Killilea* of Milwaukee, and oral argument by *Mr. Killilea.*

The following opinion was filed April 30, 1918:

WINSLOW, C. J. The stipulation that this case is governed by the federal liability law if, at the time of the accident, the deceased was at work as an employee of the defendant, renders it necessary to consider but four questions, viz.: (1) Was there evidence tending to show that the deceased was in a legal sense at work as an employee of the company at the time of the accident? (2) Was there any evidence of actionable negligence on the part of the defendant or its employees? (3) Did the deceased, as matter of law, assume the risk? (4) Was the cause of the accident mere conjecture? These questions will be discussed in their order as stated.

1. It is now quite well settled by federal decisions that "in leaving the carrier's yard at the close of his day's work" the employee is but discharging a duty of his employment, and that, if he was employed in interstate commerce while actually at work, he was, in legal contemplation, so engaged while leaving the yard when the actual work was ended. *Erie R. Co. v. Winfield,* 244 U. S. 170, 37 Sup. Ct. 556. Our own decisions are in harmony with this principle. *Ewald v. C. & N. W. R. Co.* 70 Wis. 420, 36 N. W. 12, 591; *Kunza v. C. & N. W. R. Co.* 140 Wis. 440, 123 N. W. 403. Of course the employee must be leaving by the proper and

usual way or at least by a way known to and expressly or tacitly permitted by the employer.

We think that there was sufficient evidence in the present case to take this question to the jury. The evidence is plenary that engineers were permitted, at the end of their run, to ride out to the roundhouse yard with the engine dispatcher if they chose, and it is clearly proven that such was the almost uniform practice of the deceased. There is much testimony also to the effect that employees used the entire space from the water tank (where the engine started) to the coal sheds (opposite which the body of the deceased was discovered) in going back and forth to and from their work. This space was a network of tracks, and the engine dispatcher, Vollmer, says: "Men or employees frequently cross the track down even with the coal sheds going towards town, and we have to be careful to avoid accidents, as those men sometimes pass in front of the engines." Again Vollmer says, after stating that he found some footprints in the snow coming from the west to a point about 350 feet east of the water tank, where the marks of some person being dragged in the snow began: "I don't know whether those footprints . . . were of Mr. Ewig or not, but that is the short cut through there from the shanties [*i. e.* the locker and bulletin shanties] towards the Merrill Park depot; that is the customary way." There is no evidence in the case of any active objection on the part of the defendant to this use of the tracks, and hence there was sufficient evidence to take to the jury the question whether this was a usual and tacitly permitted way to enter and leave the roundhouse yard. The argument is made that so long a time elapsed between the arrival of Ewig's engine at the cinder pit and the accident that it must be held that Ewig had stopped at the roundhouse to visit or for other purposes of his own and hence could not be held to be in service, even though leaving the grounds in a usual way. We do not think we can so hold as a matter of law. Ewig's

engine reached the Union station in Milwaukee at 9:40 o'clock. When it reached the roundhouse yard does not appear, but naturally it could hardly have reached there until some time after 10. When Vollmer left it Ewig was washing his face. Vollmer went to the roundhouse, looked over his second engine, turned the turntable, backed out, ran onto the turntable and from there onto the tank track, and thinks he got to the tank at about 11:15, probably an hour after leaving Ewig. The accident was a few minutes afterward. We do not see how a court would be justified in saying that Ewig must have stopped to visit or that he had turned aside from his duty. No one knows how long it may have taken him to wash and clean up. Apparently he delivered his work report and time slip to the proper employees at the shanties just south of the cinder pit. The work report, which is in evidence, shows that the engine brake valve was reported as needing to be cleaned out. It may well be that he stopped to talk with or give suggestions to the roundhouse foreman about this. There is absolutely no affirmative evidence to show that he was visiting or idling away his time, and we do not think that the length of time which elapsed necessarily proves the fact.

2. Was there proof tending to show actionable negligence on the part of the defendant? On this question it is urged by respondent that the uncontradicted proof shows that the engine bell was ringing, the speed moderate, and the method of handling the engine, namely, by an engineer alone with no fireman, the customary method used in the yard, and hence that no negligence can be found in these respects. This may be at once admitted, but there is one ground of negligence claimed by appellant which is not thus foreclosed, namely, the failure to keep a proper lookout. It appears that the engine was a very large one, with a high tender piled full of coal, and that when the engineer sat in the window seat on the right hand (in this case the north side)

he could not see the center of the track in the direction in which he was moving for a distance of 94 feet and could not see the south rail for a distance of 140 feet. It goes without saying that he could not see a man approaching the track from the south for a much greater distance. By Vollmer's own testimony (and this testimony is the only testimony on the subject) it appears that after looking over his engine at the water tank he got back on the engine, put in fourteen or fifteen shovels of coal, got up on the window seat, started the bell ringing, and then started the engine. His testimony justifies the conclusion that he paid no attention to the south side of the engine or to the region south of the track, from the time he got into the engine after looking it over. How long a time elapsed between the looking over of the engine and the starting of it does not appear, but it must have been several minutes. The jury might well conclude that for a number of minutes before the engine started and during the whole 800 feet from the water tank to the coal shed the engineer never looked at the south side of the track except so far as he was able to see it at a distance of 140 feet east of his engine when sitting on his window seat on the north side. It might perhaps be that, if this territory through which he was backing was a territory not generally used by employees in passing back and forth, negligence could not be predicated on failure to take an observation on the south side of the engine just before starting and at least occasionally thereafter; but this was a case where the evidence tended to show that the whole territory through which the engine was running was commonly used by employees of the company and others, apparently to the knowledge of and without objection by the defendant. Under these circumstances we reach the conclusion that the question whether there was negligence by Vollmer in failing to keep a proper lookout on the south side of the engine before starting and during the trip was properly a question for the jury.

There was, of course, ample evidence to justify a finding that Ewig was guilty of contributory negligence, but contributory negligence does not defeat the action under the federal law, but simply requires that the proportion of such negligence be ascertained and the damages diminished to that extent. See act as printed in *Second Employers' Liability Cases,* 223 U. S. 1, 6, 32 Sup. Ct. 169.

3. Upon the question of assumption of risk little need be said. It is true that assumption of risk still remains a defense under the federal act, but, as has been said by this court, that does not include risk of unexpected negligent acts of co-employees. *Graber v. D., S. S. & A. R. Co.* 159 Wis. 414, 150 N. W. 489. Under the evidence in this case there was room for the conclusion that the failure of Vollmer to keep a lookout on the south side was such a negligent act.

4. We cannot say that the cause of the accident is necessarily mere conjecture. The evidence tends to show that the deceased was struck by the engine at a point where there was much travel to and fro and where he would very naturally be crossing the track on his way to his brother's house on Twenty-eighth street. We intimate no opinion as to the fact, but simply hold that a verdict to that effect could not be said to have no evidence in its support.

By the Court.—Judgment reversed, and action remanded for a new trial.

The respondent moved for a rehearing, and the following opinion was filed July 8, 1918:

PER CURIAM. Upon respondent's motion for a rehearing attention is called to the case of *Jacoby v. C., M. & St. P. R. Co.* 165 Wis. 610, 161 N. W. 751, 164 N. W. 88, in which it was held as matter of law that a railroad employee leaving his master's premises after completing his duties was not engaged in interstate commerce, and it is claimed that the doctrine there laid down should be applied to this case.

Whether it would make any difference with the result is unnecessary to be considered. Upon the trial the parties agreed that, if the deceased was an employee at the time of the accident, the action was governed by the federal liability act, and the case was tried on that basis. By taking this position it is clear that the respondent effectually waived the objection that the case was governed by the state law and consented that it be tried as a case governed by the federal law. It was entirely competent for the respondent to do this. *Leora v. M., St. P. & S. S. M. R. Co.* 156 Wis. 386, 146 N. W. 520. It is not now necessary to consider what will be the effect should this concession not be made upon the next trial of the action.

Motion denied, with $25 costs.

STANKIEWICZ, Respondent, vs. PRANGE, imp., Appellant.

April 8—July 8, 1918.

Municipal corporations: Contract for sewers: Construction: Liability of sureties: Injury to workman: Contract for benefit of third persons.

In a contract with a city for the construction of sewers, executed by the contractor and his sureties, he agrees to maintain barriers and lights to prevent the happening of accidents for which the city might be liable; both the contractor and the sureties assume liability for and agree to pay all damages occasioned by the digging up, use, or occupancy of any street by him "or which may result from the carelessness of said [contractor], his agents, employees, or workmen;" and the sureties further covenant to pay to the city all damages and sums of money which the contractor shall be liable to pay to the city under the contract, and that they will indemnify and keep harmless the city against all liability which may in any wise result from the carelessness or neglect of said contractor, his agents, employees, or workmen. *Held*, that the liability of the sureties is limited

to the payment of such sums of money as the city might become liable for; that the clause above quoted was not intended for the benefit of third persons; that the "carelessness" therein referred to is not the failure to exercise ordinary care in the protection of workmen, but relates to the maintenance of barriers, etc., for the failure to maintain which the city might be made liable; and hence that the sureties are not liable for injuries to a workman caused by the caving in of the sides of a ditch which was being dug by the contractor.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Action on bond. On July 16, 1912, George Crilley entered into a contract in the city of Milwaukee for the construction of certain sewers. The defendants became parties to the contract as sureties for George Crilley. By the terms of said contract it was agreed between the parties and the city of Milwaukee as follows:

"And the said party of the first part [George Crilley], for himself, his heirs, executors, and administrators, further covenants and agrees to and with the said city of Milwaukee that in the performance of this contract he will, during the nighttime, put up and maintain such barriers and lights as will effectually prevent the happening of any accident in consequence of the digging up, use, or occupancy of any street, alley, highway, or public grounds of said city for which the city might be liable, and the said parties of the first and *second parts* [*Prange* and M. L. Crilley], for themselves, their heirs, executors, and administrators, hereby jointly and severally covenant and agree that they shall and they do hereby assume the liability for, and will pay on demand, any and all damage and damages occasioned by the digging up, use, or occupancy of said street, alley, highway, or public grounds by the party of the first part, or which may result therefrom, or which may result from the carelessness of said party of the first part, his agents, employees, or workmen."

It was further agreed by the parties as follows:

"And the said parties of the *second part,* for themselves, their heirs, executors, and administrators, hereby guarantee and covenant and agree to and with the said city of Milwau-

kee that the said party of the first part shall and will well and truly execute and perform this contract on his part, under the superintendence and to the satisfaction of the said commissioner of public works, and that they, the said parties of the *second part,* will well and truly pay on demand to the said city of Milwaukee any and all damage and damages and sums of money which the said party of the first part shall be liable to pay to the said city under this contract or any clause or agreement therein.

"And the said parties of the first part and second parts, for themselves, their heirs, executors, and administrators, further covenant and agree that they will well and truly save and indemnify and keep harmless the said city of Milwaukee against all liability, judgments, costs, and expenses which may in anywise come against said city in consequence of the granting of this contract to said party of the first part, or which may in anywise result from the carelessness or neglect of the said party of the first part or his agents, employees, or workmen in any respect whatever."

On or about the 22d day of October, 1912, plaintiff was employed by Cornelius J. Crilley as a laborer to do some work in and about a ditch then being dug as a part of the work to be performed under the contract. While so employed and while working in the ditch he was injured by the sides or banks of the ditch caving in. November 1, 1912, the plaintiff commenced an action to recover damages for such injuries against Cornelius J. Crilley and George Crilley as copartners under the name of Cornelius J. Crilley & Son. The defendant therein, George Crilley, appeared, but denied the copartnership, and the action was as to him dismissed, but proceeded to judgment as against Cornelius J. Crilley, judgment being entered for $430.60 damages and costs. Execution was issued and returned unsatisfied. A large part of the judgment still remains unpaid. The defendants *Herman Prange* and M. L. Crilley were the sureties on the undertaking. This action is brought against *Herman Prange* and M. L. Crilley to recover from them as sureties the amount of the judgment.

The issues were tried by the civil court, which found as follows: (1) The making of the contract between M. L. Crilley and George Crilley and the city of Milwaukee; that although the defendant *Herman Prange* did not sign the contract at the place for the signature, he signed the justification and is bound by the contract; (2) that after the date of the contract George Crilley entered upon the performance thereof and employed the plaintiff as a laborer to do work in the execution of the contract; and that while so employed plaintiff was injured on October 22d by reason of the negligence of C. J. Crilley, an agent and foreman of George Crilley; (3) that the damages sustained by plaintiff by reason of said injuries were assumed by the defendants in the said contract with the city of Milwaukee; (4) the amount of the judgment obtained against C. J. Crilley; (5) that execution was issued and returned unsatisfied; (6) that the defendants, by the contract with the city of Milwaukee, promised and agreed to pay the sum due upon said judgment. Whereupon judgment was rendered for the plaintiff in the sum of $448.47, together with costs and disbursements.

Defendants appealed from the civil court to the circuit court for Milwaukee county, which upon hearing affirmed the judgment of the civil court, and from the judgment of the circuit court the defendant *Prange* appeals.

For the appellant there was a brief by *Lenicheck, Boesel & Wickhem*, attorneys, and *F. J. Lenicheck*, of counsel, all of Milwaukee, and oral argument by *John Wickhem*.

For the respondent there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *W. L. Gold*.

The following opinion was filed April 30, 1918:

ROSENBERRY, J. The main question raised by the assignments of error is: Assuming that the defendant *Prange* signed the justification to the undertaking with the intent that he should be bound by the terms of the undertaking, are

the defendants *Prange* and M. L. Crilley liable to the plaintiff by reason of the terms of the bond hereinbefore set out?

The liability is predicated upon the following clause of the contract:

"And the said parties of the first and second parts [defendants], for themselves, their heirs, executors, and administrators, hereby jointly and severally covenant and agree that they shall and they do hereby assume the liability for, and will pay on demand, any and all damage and damages . . . *which may result from the carelessness of said party of the first part, his agents, employees, or workmen.*"

It is argued that these words embrace a claim such as that of the plaintiff, which resulted from the carelessness of one of the employees engaged in doing work which the principal contractor had agreed to do. We think, however, that the words quoted must be read in connection with and as a part of the entire contract, and that so read the liability of the sureties is limited to the payment of such sums of money as the city of Milwaukee might become liable for, and that the clause in question was not intended for the benefit of third parties, and that the defendants are not liable to the plaintiff on account thereof; that the "carelessness" referred to in the quoted language is not the failure of the contractor or his agents or employees to exercise ordinary care in the protection of workmen, but refers to the failure of the principal contractor, his agents or employees to put up and maintain barriers and lights in the streets, alleys, and public ways of the city, for the failure to maintain which the city might be made liable. This conclusion is in no way inconsistent with the decision in the case of *Concrete S. Co. v. Ill. S. Co.* 163 Wis. 41, 157 N. W. 543, or *Builders L. & S. Co. v. Chicago B. & S. Co., ante,* p. 167, 166 N. W. 320. There is nothing in the language used in the contract in this case showing that the sureties intended to be bound or that the city intended that they should be bound to any greater extent than the city

itself might be liable by reason of the failure of the principal contractor to perform the duties and obligations imposed upon him by the contract. The contract must be construed as a whole and given effect according to the expressed intention of the parties. A consideration of the other questions raised on the appeal becomes immaterial.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

A motion by the respondent for a rehearing was denied, with $25 costs, on July 8, 1918; and the mandate was amended to read as follows:

By the Court.—Judgment reversed as to appellant, *Prange*, and cause remanded with directions to dismiss the complaint as to him.

F. C. GROSS & BROTHERS COMPANY and another, Appellants, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

May 3—July 8, 1918.

Workmen's compensation: Who are employees: "Casual employment:" "Usual course of the business:" Cleaning up after special repair work.

Where one was employed to assist in cleaning up certain parts of a packing plant, although this was not a part of the regular cleaning-up work necessary in the usual conduct of the industry, but was necessitated by special and unusual repair work which had just been completed, his employment was neither "casual" nor without the "usual course of the . . . business" of his employer, within the meaning of sub. (2), sec. 2394—7, Stats. 1915.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from a judgment confirming an award of the *Industrial Commission* in favor of *Albertine Loferski.*

The *Industrial Commission* awarded compensation to the respondent *Albertine Loferski* on account of the death of her husband, Peter Loferski, as against the appellant *F. C. Gross & Brothers Company* as employer and *Wisconsin Employers Exchange* as insurer.

The appellant employer conducted a packing industry in Milwaukee. During the process of the work a certain fertilizer accumulated from time to time so that every four or five weeks it was necessary to load it on a car and remove it from the plant. This work was performed at times by their regular employees and at times by men engaged for such occasions. The deceased was not regularly employed by the appellant but had at times been called in to assist in such loading of the fertilizer. At other times he did odd jobs for other employees, but pursued no regular employment.

At the time in question here he was set to work on Monday morning in so loading the fertilizer and continued at such until Wednesday night. After this work was finished he requested employment for the balance of the week and was then engaged to assist in cleaning up and picking up odds and ends around and in certain buildings and portions of the yard of the employer consequent upon their having built a new ice box and taken out some partitions in one of their buildings. This cleaning up had been going on but a few days at the time and was not a part of the regular cleaning-up work necessary in the usual conduct of the industry.

While so engaged and early on the next day he received an injury by the breaking of a bone of his foot. He was removed to a hospital and died within three days thereafter. It appeared that his death was the result of this injury and also of delirium tremens.

Upon the review of these proceedings before the circuit court for Dane county the award of the *Commission* was affirmed, and from the judgment thereon this appeal was taken.

For the appellants there was a brief by *Otjen & Otjen* of Milwaukee, and oral argument by *Henry H. Otjen.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

For the respondent *Albertine Loferski* there was a supplemental brief by *Joseph G. Hirschberg,* attorney, and *Horace B. Walmsley,* of counsel, both of Milwaukee, and oral argument by *Mr. Hirschberg.*

The following opinion was filed May 21, 1918:

ESCHWEILER, J. The appellants contend that the employment of the deceased was casual and also not in the usual course of the trade, business, profession, or occupation of the employer. These questions involve consideration of the same provisions of the statute, sub. (2), sec. 2394—7, involved in *Holmen C. Asso. v. Industrial Comm., ante,* p. 470, 167 N. W. 808, and the construction there placed upon the provisions of this statute must control in this case and necessitates affirmance of the rulings of the circuit court and of the *Industrial Commission* and a confirming of the award.

His injury occurred, not under the contract of employment by which he was working at loading the car with fertilizer on the Monday, Tuesday, and Wednesday preceding the accident, but under the contract of employment made at the completion of that work on Wednesday, by which new contract he was to assist in doing the cleaning up necessitated by the special repair work which had just been finished.

Although it may not have been strictly accurate to speak of the work the deceased was doing at the time of his injury, as was said in the court below, that it was in the nature of janitor service or as a part of the continual cleaning-up process going on in that industry all the time, still it was repair work.

Repairs about an industrial plant, whether such repairs are what might be called usual and to be anticipated, or are

of such a nature that they may occur but once in a long industrial life, are none the less repairs, and work on such repairs, either general or special, is neither casual nor without the usual course of the business of the employer as we now construe those terms in this statute.

By the Court.—The judgment of the circuit court is affirmed.

OWEN, J., took no part.

A motion for a rehearing was denied, without costs, on July 8, 1918.

WHITE, Appellant, vs. WHITE, Respondent.
SAME, Respondent, vs. SAME, Appellant.

May 3—July 8, 1918.

Divorce: Marriage of party before judgment becomes absolute: Adultery: Vacating judgment: "Sufficient cause:" Practice: Supplementary pleadings: Consummated division of husband's estate: Continued control of court: Appealable orders: Allowances to wife during pendency of action.

1. Under sec. 2374, Stats. 1915, there is no absolute severance of the marriage relation until the expiration of one year from the entry of a judgment of divorce, and under sub. 2, sec. 2330, if either party marries again during that year such marriage is null and void, even though contracted in another state.
2. During such year the court has absolute control over the question whether the party seeking a divorce is entitled thereto; and that which has been granted conditionally by the judgment may be forfeited by violation of the conditions.
3. The provision in sec. 2360, Stats., that "no decree for divorce shall be granted if it appears . . . that the plaintiff . . . has been guilty of adultery not condoned," is applicable during the year subsequent to the trial and entry of judgment; and if such fact appears at any time before the judgment becomes absolute it is "sufficient cause," under sec. 2374, for vacating or modifying the judgment.

4. In its disposition of a divorce action a court is not confined to the facts as they existed when the action was commenced, but may take cognizance, under proper pleadings, of what is done by either party during the pendency of the action.
5. Where within a year after the entry of a divorce judgment the defendant wife moves to vacate the judgment on the ground that the plaintiff has married again, she should be permitted, under sec. 2687, Stats., to file a supplementary answer alleging adultery by plaintiff subsequent to the trial, either as a bar to his prayer for divorce or, by way of counterclaim, as ground for a divorce in her favor. Such method of determining the matter is deemed the better practice.
6. The plaintiff husband having in this case voluntarily paid, and the wife having received, the sum stipulated and adjudged to be paid as a final division of the husband's estate, it is not decided whether compliance with such a provision for a final division could be compelled before the expiration of the year after entry of judgment; but under the further proceedings which must be taken upon the supplementary answer as above indicated the sum so paid may still be controlled by the court as plaintiff's property and may be considered and disposed of in the final determination of the action, due allowance being made to the defendant for whatever she may reasonably and properly have expended.
7. An order denying a motion to vacate a judgment of divorce is appealable under sub. (2), sec. 3069, Stats., as a final order affecting a substantial right, made upon summary application after judgment. It could not be reviewed on appeal from the judgment.
8. Sec. 3041, Stats., does not, by making no provision therefor, exclude the right to appeal from such order; it merely shortens the time within which appeals might otherwise be taken from orders of the kind therein described.
9. A divorce action being pending at least until the judgment entered therein becomes absolute, an allowance to the wife for attorney's fees on her application, made within the year, to vacate such judgment, may be made under sec. 2361, Stats.

APPEALS from a judgment and an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Order affirmed on plaintiff's appeal; reversed on that of the defendant.*

Plaintiff appeals from that part of the order which allows

the defendant attorneys' fees on her motion to set aside the judgment. Defendant appeals from the judgment and also from that part of the order which denies her motion to set aside the same judgment.

The plaintiff and defendant intermarried in the state of Iowa in October, 1893, afterwards coming to Milwaukee, Wisconsin, and there residing for more than two years before this action was commenced in March, 1916. One child was born to them, a daughter, Vera, July, 1897. The plaintiff is now about fifty years of age and defendant about forty-five.

The plaintiff's complaint charged defendant with cruel and inhuman treatment of him by other means than personal violence; that she was of a morose, sullen, and austere disposition; showing no love for plaintiff; with studied vexations and provocations, fault-finding and complaining; with petulance and studied contempt of plaintiff; that her treatment of plaintiff became steadily worse during the two years preceding the commencement of the action, rendering it insupportable for plaintiff to longer live with defendant; that she frequently, and for periods of a week or longer, refused to speak to him; that she told him she was sick and tired of him and would look for someone else; had threatened to leave him and go to her home; has refused to accompany him or meet his friends; that, no matter how hard he tried, it was impossible for him to please and satisfy her; that she has been indifferent to his success and has shown no interest in his welfare, and has been guilty of such extreme neglect as to permanently destroy his peace and happiness; that her treatment of him has so annoyed and disturbed him as to impair his peace of mind, causing him constant mental suffering and injuring his health to such an extent that it is not safe for him to longer live or cohabit with her. He demanded an absolute divorce.

A verified answer which denied all allegations of cruel and inhuman treatment was withdrawn before the trial, and a stipulation was signed on July 25, 1916, by the parties, pro-

viding that if, after hearing plaintiff's proofs, the court should grant him the divorce judgment prayed for, that then the judgment should provide, as a full and final division of plaintiff's estate and in lieu of all alimony, for the payment to defendant of $10,000 and $100 attorneys' fees; that she should have the custody and care of the daughter, Vera, to whom $7.50 per week was to be paid by plaintiff for her maintenance and support. Defendant was also to have the household furniture.

Defendant offered no testimony at the trial on July 26th, and findings were made substantially and almost literally following the allegations of the complaint.

The record discloses that at the conclusion of the trial the court informed the plaintiff "that he cannot marry again within one year from the entry of the judgment of divorce."

Both the findings and judgment contained a provision, in accordance with law, substantially as follows: that neither of the parties to this action shall marry again until one year after the entry of the judgment, and the marriage of either of the parties to this action solemnized before the expiration of one year from the date of the entry thereof shall be null and void.

The judgment was dated July 26th and entered on August 5, 1916. Thereafter plaintiff moved to Boston, Massachusetts, and on November 28, 1916, obtained in Chicago, Illinois, a license to marry, and on that date went through the form of a marriage ceremony with one Mrs. H. of Milwaukee, and these two appear to have lived together as husband and wife in Massachusetts since that time.

On May 22, 1917, defendant obtained an order requiring plaintiff to show cause why the judgment should not be set aside. It was based upon affidavits; one by the plaintiff, to the effect that defendant had assured her before the stipulation above mentioned was entered into that the only reason he had for commencing the action was that he was suffering from a nervous affliction because of certain actions on her part, and

that, above all, there was no other woman in the case; that she was deceived in that he had before the divorce been corresponding with and visiting the same Mrs. H. whom he married in Chicago in November, 1916. She prayed that the judgment be vacated for the reason that plaintiff defrauded her by such false assurance and for the further reason that the plaintiff, in violation of the statute and direction of the court, married again before the expiration of the year from the entry of the judgment.

Testimony was taken on this application before the same trial judge who heard the original action. It appeared on such hearing that plaintiff for some time prior to the commencement of this action had been quite a frequent visitor at the home of Mrs. H. in Milwaukee and was there introduced to others under an assumed name. No findings of fact were made or, apparently, requested on this hearing, and the court thereupon made an order on July 6, 1917, as follows:

First, that defendant's application to set aside and vacate the judgment of August 5, 1916, be denied.

Second, that the allowance to the daughter, Vera, be changed in that it be $40 per month for six months and thereafter $50 per month until she became twenty-one years of age.

Third, that plaintiff pay to the defendant's attorney for fees, services, and disbursements $300 within six months thereafter.

Fourth, that the judgment of August 5, 1916, except as modified by the above paragraph 2 as to the allowance to Vera, remain in full force and effect.

The plaintiff appealed from the provisions granting an additional attorney fee of $300 as provided in the above third paragraph.

The defendant appealed from the first provision thereof and from so much of said order as confirmed the original judgment.

After the taking of such respective appeals the plaintiff

moved this court to dismiss the defendant's appeal. All these matters were heard together.

For the plaintiff there was a brief by *S. A. G. Cox* and *Curtis & Mock* of Milwaukee, and oral argument by *H. K. Curtis.*

For the defendant there were briefs by *Roehr & Steinmetz,* attorneys, and *Ida E. Luick,* of counsel, all of Milwaukee, and oral argument by *Ida E. Luick.*

ESCHWEILER, J. The parts of sec. 2374 of the Statutes of 1915, in force when this action was tried, material here, were as follows:

"1. When a judgment of divorce from the bonds of matrimony is granted in this state by a court, such judgment, so far as it determines the status of the parties, shall not be effective, except for the purposes of an appeal to review the same, until the expiration of one year from the date of the entry of such judgment.

"2. So far as said judgment determines the status of the parties the court shall have power to vacate or modify the same, for sufficient cause shown, upon its own motion, or upon the application of either party to the action, at any time within one year from the entry of such judgment. . . . If the judgment shall be vacated it shall restore the parties to the marital relation that existed before the entry of such judgment.

"3. It shall be the duty of every judge, who shall enter a judgment of divorce, to inform the parties appearing in court that the judgment, so far as it affects the status of the parties, will not become effective until one year from the date when such judgment is entered.

"4. Such judgment, or any provision of the same, may be reviewed by an appeal taken within one year from the date when such judgment was entered. At the expiration of such year, such judgment shall become final and conclusive without further proceedings, unless an appeal be pending, or the court, for sufficient cause shown, upon its own motion, or upon the application of a party to the action, shall otherwise order before the expiration of said period."

Until at least the year had gone by from the entry of the

judgment in this case on August 5, 1916, the parties hereto were still bound by the marital tie. *Hiller v. Johnson,* 162 Wis. 19, 154 N. W. 845. Until such year elapsed there was in existence no absolute judgment of divorce and, consequently, no absolute severance of the marital relationship.

By sub. 2, sec. 2330, of the Statutes it is declared unlawful for either party to such a divorce action to marry again during such year, and that any such attempted subsequent marriage shall be null and void. This declared public policy of the state through whose aid plaintiff sought to be released from his prior assumed obligations as the head and member of a family—that vital unit of society,—cannot be evaded or avoided by the mere crossing over into another state. State boundary lines are not fetters upon such public policy. *Lanham v. Lanham,* 136 Wis. 360, 117 N. W. 787; *Severa v. Beranak,* 138 Wis. 144, 119 N. W. 814; *Kitzman v. Werner, ante,* p. 308, 166 N. W. 789; *Andrews v. Andrews,* 188 U. S. 14, 23 Sup. Ct. 87.

It is evidently the declared purpose and policy of these statutes that until such year has passed the court still has absolute control, and up to the last moment, over the question whether the party seeking a divorce is entitled thereto, and that which has been granted conditionally by the court may be forfeited by the one to whom thus granted by his violation of the conditions attached thereto by law.

Such is the rule in Massachusetts, under a statute substantially the same as ours, announced in cases just like the one before us. *Moors v. Moors,* 121 Mass. 232; *Cook v. Cook,* 144 Mass. 163, 10 N. E. 749.

By sec. 2360 of the Statutes it is provided: "No decree for divorce shall be granted if it appears to the satisfaction of the court . . . that the plaintiff . . . has been guilty of adultery not condoned." This provision rests upon the court as well during the year subsequent to the trial and entry of the judgment as at the trial, and is not lifted before there is an ab-

solute perfected decree of divorce in full compliance with the letter and spirit of the statute. If it shall appear to the court at any time before the decree becomes absolute that the party seeking the divorce has been guilty of adultery—and under the conceded facts in this case there is no question but that plaintiff did commit adultery during the year in question,—then such adultery is well within the meaning of the term "for sufficient cause" found in sec. 2374, *supra,* for which the court shall have power to vacate or modify the judgment during the period of the year following the first entry of the judgment.

In divorce actions, in which the state has such a substantial, well-recognized interest, a court is not confined in its disposition of them to the facts as they existed at the time of the commencement of the action merely, but it may take cognizance, under proper pleadings, of what is done by either or both parties thereto during the time it is pending before it. 2 Bishop, Marriage, Div. & Sep. § 567; 14 Cyc. 674; *Moors v. Moors,* 121 Mass. 232; *von Bernuth v. von Bernuth,* 76 N. J. Eq. 487, 74 Atl. 700; *Blanc v. Blanc,* 67 Hun, 384, 22 N. Y. Supp. 264; *Armstrong v. Armstrong's Adm'r,* 27 Ind. 186; *Smith v. Smith,* 4 Paige Ch. 432.

It follows therefrom that the court below was in error by its denial of defendant's application to set aside and vacate the judgment and should have entertained such application in the manner as hereinafter indicated.

Under the situation disclosed in this case the defendant should be permitted, under sec. 2687 of the Statutes, to make a supplementary answer and assert the adultery of plaintiff subsequent to the trial, either as an absolute bar to plaintiff's prayer for divorce as by way of recrimination (*Hiecke v. Hiecke,* 163 Wis. 171, 157 N. W. 747; 9 Ruling Case Law, p. 387, sec. 180), or she may also allege it by way of counterclaim as grounds for a divorce in her favor, as she shall be advised. We deem such method by supplementary pleading the better practice, as it gives the defendant an opportunity

to elect which remedy she would choose and the plaintiff ample opportunity to be heard.

The fact that either method chosen may work a hardship to the one whom plaintiff may have induced to marry him in the meantime cannot alter the application of the law. *Crouch v. Crouch,* 30 Wis. 667; *Everett v. Everett,* 60 Wis. 200, 18 N. W. 637; *Dallmann v. Dallmann,* 159 Wis. 480, 149 N. W. 137.

The fact that plaintiff voluntarily paid and the defendant received the $10,000 specified in the stipulation and finding makes it unnecessary to decide in this case whether the court could compel, under the statute in question here, compliance with such a provision for final division of the estate of the husband before the judgment becomes absolute by the expiration of the year, or whether anything more could properly be done with relation to any necessary final division and disposition of the husband's estate or property than to secure the performance of such provisions by requiring the property itself to be held for that period by some trustee, by the giving of adequate security, or by some method that will protect the rights and interests of the parties during the statutory interval.

Under the further proceedings that must be taken herein, the $10,000 paid to the defendant can still be controlled by the court as plaintiff's property. If she be awarded a divorce it may be considered and disposed of for purpose of final division of his property, or in case divorce be denied them, under sec. 2366 of the Statutes the court may make suitable and proper orders for the support and maintenance of the wife and child by the husband, due allowance to be made to her for whatever may have been reasonably and properly expended by her in reliance upon her possession thereof under the stipulation between the parties.

Plaintiff contends that defendant cannot appeal from the order now being reversed, on the ground that, the right of ap-

peal being purely statutory, and sec. 3041 of the Statutes, providing for appeals in divorce actions and which limits the time for appeal to six months from an order "modifying or revising a judgment of divorce, so far as it determines the status of the parties to the action," making no provision for an appeal from an order such as here involved, that is, denying an application to vacate the judgment, must necessarily exclude the right to appeal from such order. We are satisfied, however, that sec. 3041 merely shortens the length of time within which appeals might otherwise be taken from the kind of order therein described, and that the order here being reviewed is appealable under sub. (2), sec. 3069, as a final order affecting a substantial right, upon summary application after judgment. *Purcell v. Kleaver,* 98 Wis. 102, 73 N. W. 322. It could not be reviewed on appeal from the judgment. *McMahon v. Snyder,* 117 Wis. 463, 94 N. W. 351.

Upon plaintiff's appeal from so much of the order of the court below as awarded to the defendant $300 attorneys' fees on the application to vacate the judgment, we shall content ourselves with saying that such an allowance can be properly made under sec. 2361 of the Statutes, for the reason that it is made during the pendency of the divorce action, and such action is pending until at least the judgment therein becomes absolute, as defined by the terms of this statute, as we have held above.

This disposition of the case renders it unnecessary to consider the questions raised and so ably discussed as to whether defendant, having defaulted; having signed the stipulation above recited as to the terms of the judgment dividing the property; and having accepted the benefits of the stipulation and judgment by retaining the $10,000 therein provided, could be permitted to appeal from the judgment itself; or the further question whether the alleged assurance to defendant that there was no other woman in the case, and upon which assurance, it is contended, she agreed to the stipulation and default, was of such fraudulent nature that the judgment for

that reason should be vacated and set aside; nor further, whether the testimony was sufficient to warrant granting plaintiff a divorce, and therefore we express no opinion upon any such questions.

By the Court.—So much of the order of the court below as allows to the defendant attorneys' fees is affirmed. That part of the order denying the defendant's application to vacate the judgment is reversed, and cause remanded with directions to set aside the judgment of August, 1916, and to permit supplemental pleadings to be interposed and the issues thereby raised determined. Defendant to have her costs and disbursements.

KERWIN, J., dissents.

BOARDMAN and another, Appellants, vs. COURTEEN, Respondent.

April 30—July 27, 1918.

Real-estate brokers: Right to commissions: Vendor and purchaser: Reasonable time for making down payment: Waiver.

In an action by brokers to recover a commission claimed to have been earned by procuring a purchaser able, ready, and willing to buy defendant's land on the terms agreed upon, the direction of a verdict in defendant's favor is *held* error, the questions whether the purchaser was to have a reasonable time, after examination of the abstract, to make an agreed down payment of $50,000, whether such time had expired when the defendant withdrew the property from the market, and whether by giving notice of such withdrawal defendant intended to terminate the contract, so that further attempted compliance with the terms of the agreement of sale was unnecessary,—being upon the evidence questions for the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

This action was brought to recover commission, $3,000,

claimed to have been earned in procuring a purchaser able, ready, and willing to purchase at the price of $150,000 certain real estate owned by the defendant.

The plaintiffs offered evidence tending to show that they procured a purchaser able, ready, and willing to purchase according to the terms of the contract, and the defendant offered evidence tending to show the contrary.

At the close of the evidence the court below directed a verdict in favor of the defendant on the ground that the undisputed evidence showed that the plaintiffs had not complied with the contract, therefore had not earned their commission. Judgment was entered in favor of the defendant, from which this appeal was taken.

For the appellants there was a brief by *Benjamin Poss* and *Christian Doerfler* of Milwaukee, and oral argument by *Mr. Doerfler.*

For the respondent there was a brief signed by *Flanders & Fawsett,* attorneys, and *Charles F. Fawsett,* of counsel, and oral argument by *John E. Tracy,* all of Milwaukee.

The following opinion was filed May 21, 1918:

KERWIN, J. The controlling question here is whether there was sufficient evidence to carry the case to the jury upon the issues involved. The evidence tends to show that in the years 1913 and 1914 the plaintiffs were engaged in the real-estate business in the city of Milwaukee; that in 1913 one Wetzel was requested by Sidney G. Courteen, husband of the defendant and her agent, to find a customer for the property referred to in the complaint at the price of $150,000. Wetzel listed the property with the plaintiffs at the price of $150,000, $50,000 cash and a mortgage for $100,000. Afterwards, the plaintiffs having procured one Miller, a prospective purchaser for the property, it was arranged that the purchaser with the plaintiffs, or one of them, meet the agent of defendant, Mr. Courteen, to agree upon terms. Thereafter the purchaser,

Mr. Miller, *Mr. Garner,* one of the plaintiffs, and Mr. Stern, Mr. Miller's attorney, met Mr. Courteen, the defendant's husband and agent, at Mr. Courteen's office. Mr. Kellogg, confidential man of Mr. Courteen, was also present. The terms were then agreed upon between the purchaser, Mr. Miller, Mr. Courteen, and *Mr. Garner,* to the effect that the sale was to be for $150,000 cash, $50,000 down and the balance in sixty or ninety days. The question of title then came up and was discussed, Mr. Courteen claiming that it was all right and produced an abstract. It appeared that the abstract had not been brought down to date. Mr. Stern, Mr. Miller's attorney, agreed that if the abstract were brought down to date and delivered to him by the following Saturday noon, May 17th, he would have it examined by the following Monday noon, May 19th. It was agreed that Mr. Courteen would have the abstract at Stern's office by Saturday noon. The testimony is not very clear as to just when the abstract was delivered to Mr. Stern, but it was sometime between noon and 4 o'clock Saturday afternoon. There is also some evidence tending to show that Mr. Stern was through with the examination of the abstract by noon the following Monday, but there is also evidence that one of the plaintiffs telephoned for the abstract during the forenoon Monday and Mr. Stern claimed he was not through with it, but that plaintiff might call for it at 4 o'clock that afternoon, which was done and the abstract obtained, Mr. Stern being through with it at that time and pronouncing the title all right.

There is also some evidence tending to show that during the forenoon Monday, on two occasions, the plaintiffs called for the abstract and asked that it be returned, but Mr. Stern declined to return it until 4 o'clock. The following morning, May 20th, Mr. Wetzel telephoned *Mr. Garner,* one of the plaintiffs, that Mr. Courteen had informed him over the phone that the property was withdrawn from the market.

It also appears from the evidence that after the agreement

of sale on the terms above mentioned the plaintiffs immediately commenced to make arrangements to procure the money to consummate the purchase, and there is evidence tending to show that at the time of the alleged withdrawal of the property from the market and afterwards the plaintiffs had produced a purchaser, Mr. Miller, who was able, ready, and willing to purchase according to the agreement. It further appears from the evidence that on the 21st day of May, 1913, defendant sold the property to one F. A. Landeck for the sum of about $148,200.

In directing a verdict in favor of the defendant it appears that the court below was of the opinion that immediately at noon Monday, May 19, 1913, at the time Stern was supposed to have finished examination of the abstract, Mr. Miller was to pay down the sum of $50,000 in cash in order to comply with the terms of the contract. The court is of opinion that this is too strict a construction of the contract under the facts and circumstances of the case. Mr. Stern held the abstract until 4 o'clock Monday afternoon, and there is at least some evidence tending to show that he required it in the examination of the title up to about that time, especially since there is evidence tending to show that he did not obtain it under the strict letter of the agreement, viz. at noon May 17th. It was at least a question for the jury whether, under the circumstances of the case, the plaintiffs were bound to produce the $50,000 cash earlier than by noon Tuesday the 20th, and there is evidence that at that time the property had been withdrawn from the market and was sold to F. A. Landeck on Wednesday, May 21st.

The abstract was held by Stern until at or about the close of banking hours May 19th, and the evidence of withdrawal was early in the forenoon May 20th.

Now the question arises whether or not the plaintiffs should have had a reasonable time, after the examination of the abstract, to produce the $50,000 cash, and whether under the

evidence it was not for the jury to say they had such reasonable time before the withdrawal of the property from the market and sale to Landeck. The jury, we think, would have the right to infer that upon notice of withdrawal of the property from the market it was the purpose of the defendant to terminate the contract, therefore further attempted compliance on the part of the plaintiffs in carrying out the offer was unnecessary. *McCabe v. Jones,* 141 Wis. 540, 124 N. W. 486; *Bunyard v. Farman,* 176 Mo. App. 89, 161 S. W. 640.

The contract between plaintiffs and defendant is not clear as to whether the payment of $50,000 was to be made on or before a specified date. At least from all the evidence and surrounding circumstances the jury would have the right to determine whether the plaintiffs were to have a reasonable time, after examination of the abstract, to make the down payment and whether such time had expired.

Upon all the evidence produced the court is of opinion that the case should have been submitted to the jury on the contested facts, therefore it was error to direct a verdict.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

A motion for a rehearing was denied, with $25 costs and costs of motion, on July 27, 1918.

NEWPORT HYDRO CARBON COMPANY, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

May 4—July 27, 1918.

Workmen's compensation: Conditions of liability: "Performing service growing out of and incidental to his employment:" Death caused by practical joke.

While an electrician was getting a drink, charged testing wires were placed, by a fellow workman, in contact with the tools which he was using, and when he resumed work he received a fatal shock. His duty to his employer required him to work at that place and to use and to come in contact with the tools and wires which caused his death. *Held*, that he was at the time "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats., and that the injuries sustained grew out of and were incidental to the employment, even though his fellow workman had adjusted the wires for the purpose of playing a joke on him, supposing he would receive only a slight shock, and even though he himself had a few minutes earlier suggested that the fellow workman touch a certain piece of iron which was perhaps charged, his own participation in the joking or larking, if such it was, having terminated some time before the injury. *Federal R. M. Co. v. Havolic*, 162 Wis. 341, distinguished.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Workmen's compensation. On April 20, 1917, the deceased, Joseph Kohn, was an electrician and employed by the plaintiff as a part of an electrician's gang consisting of eight men. On that day Kohn and Pearson, a fellow workman, were engaged in cutting a piece of conduit to be used in the installation of a motor. The piece upon which they were working was fastened in a vise which was attached to a bench about thirty inches high and thirty-six inches wide. On the wall back of the bench was a conduit out of which ran an ordinary piece of electric lamp cord carrying two strands of wire. Two short heavy pieces of insulated wire were welded

on to the two strands of wire. The insulation at the end of the two heavier pieces was scraped off for about half an inch, and these wires carried a current which was used for testing fuses, motors, and other electrical equipment. When not in use the testing apparatus was hung in a piece of two-inch angle iron by sticking the ends through holes in the angle iron, which was thus made to serve as a rack for holding the wires. These wires were alive if connected or if both uninsulated ends were attached to a piece of metal or any other substance which would close the circuit. There was no switch on the wall at the point where the lamp cord left the conduit, but there was a cabinet near by containing a series of switches where the current which went to this testing apparatus could be turned off. The work in which the deceased, Kohn, and Pearson were engaged did not require them to make any use of the testing wires, and the wires were in their proper place, the ends being stuck through the holes in the angle iron. While engaged in working upon the piece of conduit in question Kohn suggested to his helper, Pearson, that Pearson touch the angle iron, but Pearson thinking the angle iron was charged declined to follow the suggestion. About five minutes later Kohn left his work to get a drink, and while he was gone Pearson took the wires from the angle iron and laid them against the hacksaw, which in turn rested against the vise which held the conduit upon which Kohn was working, with the expectation that when Kohn returned and resumed his work he would receive a little shock. Pearson called the attention of two other workmen to the situation and suggested that they watch the result. When Kohn returned to the bench he took hold of the conduit for the purpose of going on with his work and received an electrical shock which killed him. The proof showed that this was the first time that these wires had ever been used for the purpose of perpetrating jokes. There is no proof tending to show that any foreman or superior of either Kohn or Pearson knew that the testing

wires had ever been used prior to the time of Kohn's death for the purpose of larking or joking.

The defendant *Nettie Kohn* made application to the *Industrial Commission* for compensation, and on August 17, 1917, was awarded $3,000. Plaintiff commenced an action to review the award of the *Commission* in the circuit court for Dane county. Upon hearing the court affirmed the award of the *Commission,* and from the judgment of affirmance the plaintiff appeals.

For the appellant there was a brief by *Williams & Stern* of Milwaukee, and oral argument by *B. F. Williams.*

For the respondent *Industrial Commission* there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt.*

The following opinion was filed May 21, 1918:

ROSENBERRY, J. Plaintiff's claim is that the circuit court erred in entering judgment affirming the award of the *Industrial Commission* for the reason that it clearly appears that the deceased, Joseph Kohn, was not "performing service growing out of and incidental to his employment" (sub. (2), sec. 2394—3, Stats.) at the time he sustained the injury which resulted in his death. It is the claim of the plaintiff that this case is ruled by *Federal R. M. Co. v. Havolic,* 162 Wis. 341, 156 N. W. 143. In that case the claimant was employed in a rubber tire factory, and his duties did not require him to use or come in contact with the compressed air system, and he knew that its use by employees to clean their clothes was forbidden. On quitting work for the day he took down the air hose and began to blow the dust from his clothing. A fellow workman, taking the hose from his hands, proceeded to clean the claimant's back, and as a joke held the nozzle against the claimant's body, resulting in a rupture of his in-

testines. It was there held that the employee was not at the time of the accident performing service growing out of and incidental to his employment, and compensation was denied, and the court approved the principle laid down in *McNicol's Case,* 215 Mass. 497, 102 N. E. 697, to the effect that "the causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

As was pointed out by the trial court, "In the case at bar the duty of the decedent to his employer required him to use and to come in contact with the tools and wires which caused his death. In the *Havolic Case* cited above the court pointed out that 'Had the claimant hurt himself in some way while he was handling the hose in the effort to remove the dust from his clothes, a different question would have been presented.'"

Here the deceased, in the usual course of his duty, was required to work upon the conduit at the place in question, and at the time of his death was engaged in the performance of his duties and had not in the slightest degree departed therefrom, and while so engaged he was instantly killed. We think it must be said under such circumstances that the deceased was performing a service growing out of and incidental to his employment. The accident was one that followed as a natural incident to the work performed. The hazard was one to which the decedent would not have been equally exposed apart from his employment. The danger was one peculiar to the work and not common to the neighborhood. In this case if the deceased had not resumed his work he would not have been injured. It was necessary for him in carrying on his work to do the act which resulted in his

death. How can it be said under such circumstances that injuries sustained by the deceased did not grow out of and were not incidental to his employment?

The fact that the wires were adjusted by a fellow workman does not alter the situation in this case, even if he did it for the purpose of playing a joke on the deceased. *Knopp v. American C. & F. Co.* 186 Ill. App. 605. See note, L. R. A. 1916A, 232, 240. The deceased was not a party to the joke or larking of his fellow workman.

In the *Knopp Case* the court said:

"How can his rights be affected by the fact that the man who placed the can on the die says he did so 'just to have some fun.' So far as the proper continuance of the work was concerned, it was immaterial whether the obstruction was placed there by Novak for fun or was placed there by someone by mistake or came there through some accident. Had Knopp been engaged in joking with Novak or playing with him, and in carrying on their pranks Novak would put the can on the die and Knopp remove it, both entering into the spirit of the transaction in concert, it may be that appellee could not be held to have received his injury in the course of his employment. But in this case appellee took no part in the joking himself, but proceeded to clear the die of the obstruction upon it so that he could continue the work he was employed by appellant to do, and what he did was for the benefit of his employer."

Here the fact that Pearson adjusted the wires for the purpose of playing a joke on the deceased did not change the situation of the deceased and make outside of his employment that which otherwise grew out of and was incidental to his employment. So far as the deceased was concerned, he having no part in the so-called joke, it was immaterial whether the wires dropped accidentally or were placed in position by Pearson. The fact that deceased had suggested to Pearson that Pearson touch the angle iron does not affect the result. The claim is that he thereby invited retaliation. If that be

conceded it does not alter the fact that at the time he received the injury he was performing a service growing out of and incidental to his employment within the exact terms of the law. If what the deceased did can properly be described as joking or larking, his participation therein had terminated and the joke was at an end some time before the injury, so far as he knew. We think the circuit court properly affirmed the award.

By the Court.—Judgment affirmed.

OWEN, J., took no part.

A motion for a rehearing was denied, without costs, on July 27, 1918.

APPENDIX

RULES OF PRACTICE

IN THE

SUPREME COURT

OF

WISCONSIN

Adopted June 21, 1906
With Subsequent Amendments

Also Amendments to the Circuit Court Rules
Adopted June 5, 1918

CHAPTER INDEX

Chapter I. Record and Return.

Chapter II. Cases and Briefs.

Chapter III. Service of Papers.

Chapter IV. Calendar and Assignments.

Chapter V. Submission of Causes.

Chapter VI. Motions.

Chapter VII. Costs and Penalties.

Chapter VIII. Miscellaneous.

RULES OF PRACTICE

CHAPTER I.

RECORD AND RETURN.

RULE 1. Every record and transcript thereof, filed with the clerk of the supreme court, shall be arranged as follows:

(1) Summons or other process.
(2) Proof of service.
(3) Complaint, petition, relation, or affidavit initiating the proceeding, with the date of service.
(4) Answer or demurrer, with date of service.
(5) Reply, demurrer, or election to take issue, with date of service.
(6) Orders material to the appeal, and papers upon which they are based.
(7) The verdict, findings of the court or referee, with orders based thereon, and opinion of the court, if any.
(8) Final determination.
(9) Any order made after judgment, material to the appeal, and the papers upon which the same is based.
(10) Bill of exceptions.
(11) Writ of error or notice of appeal, with the bond or undertaking.
(12) Certificate of the clerk to the return.

Such record or transcript shall be consecutively paged on the left-hand margin.

RULE 2. The record or transcript shall not be accompanied by any paper, other than those specified, or which is not part of the record proper.

RULE 3. The return to any writ of error or *certiorari* shall be by certified copy of the record, unless the trial court shall order the original papers to be returned.

RULE 4. The appellant or plaintiff in error shall cause the proper return to be made to this court within twenty days after filing of the writ or perfecting the appeal.

RULE 5. In case of a defective return, either party may, upon motion, have an order for a further return.

CHAPTER II.

CASES AND BRIEFS.

RULE 6. In calendar causes, appellant or plaintiff in error shall print a case containing an abridgment of the record, so far as necessary to present the questions for decision, stating at the beginning whether a judgment, an order, or both are sought to be reviewed, and giving the name of the trial court and the name of the judge who presided at the trial. The case shall be paged and shall mention each paper not printed or abridged, with an appropriate reference to the page of the record where it is to be found.

Cited in 135 Wis. 535, 538; 138 Wis. 491, 493, 654, 659; 139 Wis. 109, 114, 119, 125, 182, 186, 413, 418, 449, 455; 140 Wis. 436, 440; 141 Wis. 22, 29; 143 Wis. 144, 156, 157, 163; 146 Wis. 26, 34, 85, 88; 161 Wis. 176, 179.

RULE 7. Each case of more than twenty pages shall have a printed index, alphabetically arranged, referring to each paper in the case, the names of the witnesses, and the pages of the direct, cross, and redirect examination.

RULE 8. If the printed case, as served, is incomplete or inaccurate, the opposing party may, within ten days after receiving the same, serve on the attorney for the appellant or plaintiff in error a supplemental case, making the necessary corrections, with an appropriate index and references to the record.

RULE 9. In calendar causes each party shall print a brief, giving references to the pages of the record and printed case for each statement and proposition based on the record. When a statute is involved in the question raised on appeal so much thereof as is necessary to the decision of the case shall be printed at length.

Cited in 141 Wis. 48, 56.

RULE 10. The brief of appellant or plaintiff in error shall contain a concise statement of the nature of the action and the issues involved, the result of the trial in the court below, the errors relied upon, the leading facts or conclusions which the evidence tends to prove, the principles of law applicable, and the authorities in support thereof.

Cited in 133 Wis. 406, 413, 416; 135 Wis. 254, 258, 535, 538, 606; 141 Wis. 48, 56; 150 Wis. 532.

RULE 11. The brief of the respondent or defendant in error may also state the leading facts or conclusions which the evidence tends to prove, and the principles of law in support of the same, with authorities.

Cited in 141 Wis. 48, 56; 163 Wis. 400, 403.

RULE 12. Discussions of facts in briefs shall be as brief as practicable; references shall be made to the pages of the printed case where the evidence relied on may be found.

Cited in 135 Wis. 535, 538; 141 Wis. 48, 56.

RULE 13. Cases and briefs shall be printed plainly with black ink, on white paper, properly paged at the top, with a margin on the outer and inner edge of an inch and a half, and with a printed page seven inches long and three and a half inches wide, bound in a paper or cloth cover, having the title of the cause and designation of the brief printed in appropriate type on the outside; and shall be signed by the counsel preparing the same.

CHAPTER III.

SERVICE OF PAPERS.

RULE 14. Service of all papers may be made by mail, postage prepaid, properly addressed to the person to be served; two days being allowed for transmission where the route is wholly by railroad and an additional day for every fifty miles other than by railroad.

RULE 15. Every notice of a motion shall be served on the opposite party at least eight days before the making of the motion.

RULE 16. Three copies of the printed case shall be served by the appellant or plaintiff in error on the opposite party, at least forty days before the time set for the argument.

Cited in 133 Wis. 510, 513.

RULE 17. At least twenty days before the time set for argument of the first assignment of cases on any calendar, the clerk shall send to every attorney appearing in the causes on the calendar for the term a list of such causes as arranged on the calendar.

RULE 18. The brief of the appellant or plaintiff in error shall be served on the opposing party at least fifteen days, and that of the respondent or defendant in error at least five days, before the calling of the cause for argument. Each party may serve and submit a supplemental brief on the argument, confined strictly to matter of reply; and no brief shall be served or received except as provided, unless permission be granted.

RULE 19. Before a cause is called for argument, the plaintiff in error or appellant shall file with the clerk fifteen copies of the printed case, and each party fifteen copies of his brief.

RULE 20. Any cause on the state calendar may be put on any assignment by consent, or when either party has given ten days' written notice to the other party before the assignment has been ordered made up.

RULE 21. The time prescribed by these rules for any act, except for the making of a motion for a rehearing, may be enlarged by the court for cause, on motion.

Cited in 131 Wis. 494.

CHAPTER IV.

CALENDAR AND ASSIGNMENTS.

RULE 22. On the August calendar shall be placed all causes in which the record shall have been filed before August 15th, and on the January calendar all causes in which the record shall have been filed before January 1st. Any case may be placed upon the calendar or advanced for hearing at any time in which it is shown that the interests of the state, the people

at large, or of any municipality are affected, or an important constitutional question is seriously raised, or an extraordinary exigency is involved, and it is further shown that delay would be prejudicial to the accomplishment of justice. No appeal shall be placed upon the calendar unless the requirements of this rule be complied with, except as provided in Rule 62.

RULE 23. Actions and proceedings brought under the original jurisdiction of this court, commenced prior to either of the dates fixed for the filing of records in the last preceding section, shall be placed upon the proper calendar.

RULE 24. Within ten days after each of the dates named in Rule 22 for the filing of records, the clerk shall prepare and cause to be printed a calendar, arranging all civil causes by circuits, and placing first in order the circuit next succeeding in number to the first on the previous calendar, and arranging the criminal causes in their order at the foot.

RULE 25. When a cause on the state calendar shall have been submitted by one party, the adverse party may have it put at the foot of any assignment.

RULE 26. Cases on the calendar not reached for argument during any term shall stand continued and be considered as at the head of the next calendar.

RULE 27. In all criminal cases the plaintiff in error, at least twenty days before the case is called for argument, shall serve upon the attorney general a statement of the errors relied upon and a copy of his brief; and the attorney general shall serve his brief on the attorney for the plaintiff in error at least five days before such argument.

RULE 28. The calendar causes shall be assigned for argument at such time and in such order as the court may direct.

RULE 29. Not less than twenty causes shall be placed on each assignment, and the clerk shall, as soon as practicable after an assignment shall have been made up, transmit a copy thereof to each attorney or firm of attorneys appearing therein.

CHAPTER V.

SUBMISSION OF CAUSES.

RULE 30. Causes may be submitted on either or both sides on printed cases and briefs, seasonably served and filed, but the court may, in its discretion, require oral arguments.

RULE 31. If neither side of a cause is submitted or presented when reached for argument, it will be dismissed or continued, in the discretion of the court.

RULE 32. When a cause is submitted or presented by counsel for appellant or plaintiff in error, but not by the opposing party, the judgment or order appealed from may be reversed as of course, without argument.

RULE 33. When a cause is submitted or presented by counsel for the respondent or defendant in error, but not by the opposing party, the judgment or order appealed from will be affirmed as of course, without argument.

RULE 34. Unless otherwise specially ordered, oral arguments will be limited as follows: Two hours on each side in causes wherein the amount in controversy, exclusive of costs, is $5,000 or over; one hour on each side in causes wherein the amount in controversy, exclusive of costs, is less than $5,000 and more than $500; and one-half hour on each side in all other contested matters.

RULE 35. In felony cases, two counsel may be heard for not exceeding two hours on each side. In all other criminal cases, but one counsel may be heard on each side for not exceeding one hour, unless otherwise specially ordered.

RULE 36. On the first day of each session of the court, the first eight causes on the assignment may be peremptorily called for submission, and an additional eight causes may be so called on each succeeding day during the hearing of the assignment. All causes not called on the day for which they are set will be called in their order on succeeding days.

CHAPTER VI.

MOTIONS.

RULE 37. Every motion for a rehearing shall be filed within thirty days after the decision, and the clerk shall retain the papers till the expiration of such period, unless all parties interested consent to sooner remit the same.

Cited in 131 Wis. 473, 488, 493.

RULE 38. The papers in any cause wherein a motion for a rehearing is made shall be retained until the motion shall have been disposed of.

RULE 39. A motion for a rehearing shall not be argued orally, but shall be submitted on printed arguments, of which fifteen copies shall be furnished to the clerk.

RULE 40. The printed arguments in support of the motion shall be served and filed within forty days after the decision, and in default thereof the motion shall be deemed to have been waived.

RULE 41. The printed arguments in opposition to the motion shall be served and filed within fifty days after the

decision, at which date the motion shall be deemed to have been submitted.

RULE 42. No motion as to any final determination made by the court, except a motion to correct mistakes in the record of this court, will be heard unless made within thirty days after such determination.

Cited in 131 Wis. 473, 493, 494.

RULE 43. Motions will be heard before the call of the calendar on Tuesdays and Fridays during the sessions of the court. Motions noticed for a day when the court shall not be in session will be heard on the first motion day thereafter.

RULE 43*a*. In divorce actions pending in this court on appeal perfected after July 1, 1910, no allowances for suit money, counsel fees, or disbursements in this court, nor for temporary alimony or maintenance of the wife or children during the pendency of the appeal, will be made in this court.

Such allowances, if made at all, shall be made by the proper trial court upon motion made and decided after the entry of the order or judgment appealed from and prior to the return of the record to this court; *provided,* that if such allowance be ordered before the appeal is taken such order shall be conditioned upon the taking of the appeal and shall be without effect unless and until the appeal be perfected.

CHAPTER VII.

COSTS AND PENALTIES.

RULE 44. No costs shall be taxed for printing any case, supplemental case, or brief unless these rules shall have been complied with.

Cited in 135 Wis. 535, 539; 138 Wis. 493, 659; 139 Wis. 114, 186, 413, 418; 140 Wis. 440; 141 Wis. 30; 143 Wis. 157, 163; 146 Wis. 34, 88; 151 Wis. 485.

RULE 45. No costs of printing shall be allowed for any brief containing a manifest miscitation of authority or a palpably misleading quotation from any opinion or text-book, not corrected by the author before submission of the cause.

RULE 46. When either case or brief is not served within the time and in the manner required by these rules the opposite party, if not in default, shall be entitled to a continuance for the term with $25 costs, or the court may direct the cause to stand for argument and charge the penalty named to the defaulting party, by denying costs to that amount in case such party prevails, and adding it to the other costs if such party does not prevail.

Cited in 129 Wis. 642; 130 Wis. 638; 133 Wis. 510, 513.

RULE 47. When a party fails to procure and file the proper return, the opposing party may move to dismiss the writ or the appeal, with taxable costs, including attorney's fees of $25. In case such motion be made during a recess of the court the chief justice may make the proper order or judgment thereon with the same effect as if made by the court in session.

RULE 48. When a proper return shall have been filed before the final determination of a motion to dismiss for want of such return, the motion may be denied upon payment of costs by the opposite party, in the discretion of the court, not exceeding $25.

RULE 49. When a supplemental return is ordered upon application of a party, and the defect in the original return is attributable to the fault of the opposing party, the court may, in its discretion, order costs to be paid to the moving party, not exceeding $25; payment to be enforced as directed.

RULE 50. No costs shall be taxed for printing any brief containing matter disrespectful to this court or the trial court, or to opposing counsel; and the court will not consider such a brief, and of its own motion will strike it from the files.

Cited in 132 Wis. 272, 278.

RULE 51. If an attorney, in addressing the court, indulges in language disrespectful to this court or to the trial court, or to the opposing counsel or party, he will be prohibited from further addressing the court in the cause, without prejudice to any other proceeding to inflict punishment for such misconduct.

Cited in 137 Wis. 507, 517.

RULE 52. When a motion for a rehearing, or a motion in the nature of a motion for a rehearing, is denied, costs will be allowed to the prevailing party, consisting of clerk's fees, necessary disbursements, and an attorney's fee, to be fixed in view of the facts and circumstances of each case, but not to exceed the sum of $25.

RULE 53. When it shall be necessary on a motion for a rehearing to examine any question not theretofore presented in the briefs, or to examine further any question theretofore presented, and the motion be denied, the attorney's fee of the prevailing party shall not exceed $10, unless a question of more than ordinary difficulty be presented.

CHAPTER VIII.

MISCELLANEOUS.

RULE 54. Attorneys and guardians *ad litem,* appointed by the court below, will be deemed to continue in service until the contrary appears.

RULE 55. All causes which have been pending in this court for two years, wherein no record has been filed, may be dismissed without notice, upon payment of the clerk's fees.

RULE 56. No record shall be filed unless the same be accompanied by a deposit of $10 with the clerk, to be applied on his fees, the same to be recovered from the opposing party if appellant prevails on appeal, and to be credited to him on the judgment if the opposing party prevails.

RULE 57. The appellant shall have the right to open and close the argument in all cases, whether legal or equitable.

RULE 58. When a judgment is reversed, the cause, if tried by the court, will ordinarily be remanded for final judgment, and if tried before a jury, for a new trial; but if it appear in a jury cause that there has been a full trial and that justice will be best subserved by the direction of a judgment, the cause will be remanded for final disposition according to the right of the matter, whether such judgment will have the formal verdict of a jury as a basis therefor or not.

RULE 59. Upon a continuance for favor, the opposing party shall be entitled to costs, not exceeding $25, unless such continuance shall have been made necessary through the fault of such party, in which case such party may be denied costs, and costs may be imposed on him, in the court's discretion, for the benefit of the moving party, not exceeding $25.

RULE 60. For infraction of any of the rules of this court for which no penalty is expressly provided, the offending party may be mulcted in costs, in the court's discretion, for the benefit of the opposing party.

RULE 61. If through mistake, inadvertence, or excusable neglect the appeal shall not have been perfected, or the bill of exceptions be not properly certified so as to permit a decision of the questions presented for review, the appellant will be given reasonable opportunity to correct the error, on such terms as may be just.

RULE 62. Where, through mistake, inadvertence, or excusable neglect, the return upon appeal in any cause shall not be filed within the time limited by section 22 of these rules, the court may, upon motion noticed for hearing on the first day of the term, place the cause on the calendar, on such terms as may be just.

RULE 63. All maps, exhibits, or models constructed or intended for the mere purpose of illustrating the issues in any action or proceeding pending in this court shall be placed free of expense in the custody of its clerk prior to the case being set down for argument and, without expense to such clerk, taken away within thirty days after the expiration of the time for retention of the record in this court, and in default thereof the same shall be turned over to the officer of the court for destruction or other permanent disposition.

RULE 64. In cases where the order or judgment is affirmed, opinions will not hereafter be written unless the questions involved be deemed by this court of such special importance or difficulty as to demand treatment in an opinion.

Cited in 161 Wis. 284.

AMENDMENTS TO CIRCUIT COURT RULES.

On June 5, 1918, it was

Ordered, that the existing Rules of the Circuit Courts be and the same are amended as follows:

1. Section 3 of Rule III is amended by striking out the words "at least eight days before the term" at the end of the section.

2. Section 3 of Rule IV is amended by striking out the words "in the afternoon of" in the first line of the section and inserting in lieu thereof the word "on."

3. Section 7 of Rule IV is amended by replacing the period at the end thereof with a comma and adding the words "or unless the order shall be reduced to writing and properly signed as a court order."

4. Rule V is amended by striking out section 1 thereof and renumbering 2 and 3 as sections 1 and 2 respectively.

5. Rule XXIII is amended by striking out sections 3 and 4 thereof and by inserting a new section to be called section 3, reading as follows:

"Section 3. In all cases where testimony given at the trial shall have been taken down by a phonographic reporter, the party desiring to settle a bill of exceptions shall procure from such reporter full and complete duplicate or triplicate transcripts in long hand of such testimony and other matters relating to the action contained in his notes, each of which transcripts shall be duly certified to be a correct transcript of such notes. One of such transcripts, with such additions as may be necessary, shall constitute the proposed original bill of exceptions, and one shall be used as a copy to serve on the adverse party, as provided by section 2874 of the Wisconsin Statutes, the third, if procured, being retained by the party procuring the same. When there are two or more adverse parties who appear by different attorneys, and such attorneys

fail to agree as to the use of the copy served, in settling the bill of exceptions, the court shall make such order as shall be necessary to protect the rights of all parties without requiring the procuring or service of an additional copy thereof. Nothing herein contained shall be considered to affect the right of the parties to make stipulations as to the form or contents of the bill of exceptions under the provisions of section 2873 of the Wisconsin Statutes."

6. Section 6 of Rule XXV is amended by striking out the words "at the rate of ten per cent. per annum" where they occur in said section and inserting in lieu thereof the words "as provided by law."

7. Section 3 of Rule XXVIII is amended by striking out the words "section 2359, Statutes of 1898," and inserting in lieu thereof the words "section 2355 of the Wisconsin Statutes."

8. Section 4 of Rule XXIX is amended by inserting after the word "term" in the third line thereof the words "or adjourned session thereof," also by striking out the last sentence of the section beginning with the words "Leave to answer" and inserting in lieu thereof the following: "The motion shall be brought on for hearing on or before the first day of the term or of the adjourned session thereof at which the case is triable, and if not so brought on for hearing within said time the motion shall be granted only on terms."

As so amended and revised the said Rules of the Circuit Courts are hereby re-adopted and ordered to be published.

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APPEAL AND ERROR.

From what appeal may be taken: Appealable orders.

1. An order denying a motion to vacate a judgment of divorce is appealable under sub. (2), sec. 3069, Stats., as a final order affect-

ing a substantial right, made upon summary application after judgment. It could not be reviewed on appeal from the judgment. *White v. White,* 615

2. Sec. 3041, Stats., does not, by making no provision therefor, exclude the right to appeal from such order; it merely shortens the time within which appeals might otherwise be taken from orders of the kind therein described. *Ibid.*

Right of review: Who may appeal. See JUDGMENT, 5.

Same: Waiver of right: Acquiescence in order.

3. A party who intentionally accepts the fruits of an order cannot maintain an appeal therefrom, even though he did not intend to relinquish such right. *Hanson v. Chicago & L. S. R. Co.* 335

4. Where, on petition of the vendor of a railway car, the receiver of the insolvent purchaser was ordered to deliver the car to the vendor upon condition that the latter surrender unpaid notes given for the purchase price, and the vendor thereafter took the car without surrendering the notes, such taking must be deemed to have been in pursuance of the order and the vendor cannot thereafter appeal therefrom. *Ibid.*

5. A suggestion by the receiver that the vendor remove the car before the track laid by the purchaser should be taken up gave the vendor no rights contrary to the order and did not prevent the removal from being an acquiescence in the order. *Ibid.*

What errors may be reviewed: Motions for new trial.

6. Errors committed by the trial court, such as the improper admission of testimony, may be reviewed on appeal from the judgment although there was no motion for a new trial, such motion being necessary only to preserve for review errors committed by the jury. *Sullivan v. M., St. P. & S. S. M. R. Co.* 518

Parties to appeal: Default: What questions considered.

7. Where notice of an appeal from such judgment by the defendant held liable was addressed to and served upon the other defendant, the latter, though in default, is a party to the appeal and the effect of the judgment as to him may be considered. *Bakula v. Schwab,* 546

Stay of proceedings in court below. See NEW TRIAL, 2, 3.

Record: Bill of exceptions when unnecessary.

8. Where all the questions involved in an appeal appear from the record, a bill of exceptions is unnecessary. *Progress Blue Ribbon Farms v. George,* 228

Review: Questions presented: Prior orders.

9. An appeal from an order of the circuit court reversing a judgment of the Milwaukee civil court and granting a new trial in the circuit court does not bring before the supreme court for review a previous order of the circuit court denying a motion to dismiss the appeal from the civil court to the circuit court. *Zawacki v. Good Samaritan Hospital,* 422

Same: Questions of fact. See ASSIGNMENTS. BROKERS, 2, 3. INSURANCE, 8. MASTER AND SERVANT, 13. WILLS, 3.

10. Although on appeal great weight is to be given to a decision of the trial court changing answers in a special verdict, yet where the verdict as rendered is supported by credible evidence such changes are unwarranted and a judgment based on them must be reversed. *Delvaux v. K., G. B. & W. R. Co.* 586

Same: Presumption as to findings on matters omitted from special verdict. See REPLEVIN, 2.

Affirmance and reversal: Material and immaterial errors. See BASTARDY. CRIMINAL LAW, 2. INSURANCE, 2. WORKMEN'S COMPENSATION, 19.

Same: Errors affecting damages cured by remission.

11. In an action for personal injuries, where the trial court required plaintiff, as a condition of judgment in her favor, to remit $1,000 of the $3,000 damages awarded by the jury, such remission is *held* to have compensated adequately for whatever prejudice, if any, resulted to defendant from the refusal to strike out certain testimony as to plaintiff having been taken to a hospital and there operated upon, from the inclusion in the special verdict of a question relating to mental suffering, from an instruction in which it was assumed that plaintiff was in the hospital for a longer time than the evidence showed, and from the refusal of a new trial asked for on the ground that the evidence was insufficient as a basis for assessing the damages—all of such rulings having been such as to affect only the question of damages. *Bakula v. Schwab,* 546

Affirmance by divided court. See MASTER AND SERVANT, 1. TAXATION, 3.

Appeal from Milwaukee civil court. See APPEAL, 9.

Appeal from justice's court. See UNLAWFUL DETAINER, 1.

Appeal from city council. See MUNICIPAL CORPORATIONS, 6.

Appeal from town supervisors. See DRAINS, 5.

APPEALABLE ORDERS. See APPEAL, 1, 2.

ARGUMENT OF COUNSEL. See NEW TRIAL, 1.

ASSAULT AND BATTERY. See HOMICIDE, 1, 2.

ASSESSMENTS.
Paid on benefit certificate: Recovery. See INSURANCE, 12–15.
For street improvements. See MUNICIPAL CORPORATIONS, 7, 8.

ASSIGNMENTS.

Of causes of action: Validity: Real party in interest.

Separate actions by two persons injured in a collision between a railway train and an interurban car of a traction company were brought both against the railway company and the traction company. Trial of one action resulted in a verdict against the traction company and a nonsuit as to the railway company, no evidence as to the latter's negligence having been offered, and afterwards that action was discontinued. Thereafter a stockholder of the traction company purchased and took an assignment of both claims, borrowing the money for that purpose from the traction company and giving his note therefor. He then brought actions against the railway company, in each of which the traction company was afterwards brought in as a defendant; and later such actions were consolidated. There being positive, undisputed evidence that plaintiff bought the claims in his own right and at his own risk, the mere fact that he took the assignments because of his interest in, and with a view to aiding, the traction company did not render such as-

signments void or ineffectual or justify the trial court in changing findings by the jury that the assignments were not taken in behalf of the traction company and that plaintiff and not the traction company was the real party in interest. *Ellis v. Chicago & N. W. R. Co.* 392

Of contracts. See CONTRACTS, 3.

Of benefit certificates. See INSURANCE, 10.

ASSUMPTION OF RISK. See MASTER AND SERVANT, 11.

ATTESTATION. See WILLS, 1.

ATTORNEY AND CLIENT.

Authority of attorneys: Stipulations. See PARTNERSHIP, 10.

Compensation: Value of services. See EVIDENCE, 3. PLEADING, 1.

Upon the evidence in this case the trial court was justified in setting aside a verdict to the effect that $325 was an excessive charge for the services of attorneys in collecting $6,512.50 due on a land contract. *Hollingworth v. Shannon,* 224

Allowances for attorneys' fees. See DIVORCE, 5.

AUTOMOBILES. See HIGHWAYS, 3–6. NEGLIGENCE, 2.

BAKERIES: Licensing. See CONSTITUTIONAL LAW, 4–7.

BANKRUPTCY. See CARRIERS, 2–9.

BANKS AND BANKING.

Purchase of notes: Knowledge of contract affecting negotiability. See BILLS AND NOTES.

Trust companies: Fraud in investing funds: Right of action.

1. When a trust company to which money was intrusted for investment fraudulently invested it in worthless or depreciated securities, a cause of action at once arose in favor of the owner for damages on account of the resulting loss to him. *Woodard v. Citizens S. & T. Co.* 435
2. Upon the death of such owner said cause of action vested in his estate and passed to his personal representatives, to be prosecuted for the benefit of the general estate. *Ibid.*
3. The assignment by the county court, upon settlement of the estate, of the worthless or depreciated securities themselves to a testamentary trustee as part of a trust fund to be held by him, did not invest him with title to said cause of action. *Ibid.*

Issuance of worthless checks: Intent to defraud: Evidence.

4. The offense made punishable by sec. 4438*a*, Stats. 1917 (Laws 1917, ch. 164), is complete when, with knowledge of an insufficiency of funds or credit as there stated, a bank check is made, drawn, or uttered with intent to defraud. The provision in sub. 2 of said section relating to nonpayment by the maker or drawer within five days after notice of the drawee's refusal to pay, is a rule of evidence only. *Merkel v. State,* 512
5. In a prosecution under sec. 4438*a*, Stats. 1917, copies of bank-book entries, duly verified as provided in sec. 4189*b*, were properly admitted in evidence. *Ibid.*

BASTARDY.

In a bastardy proceeding where the evidence was conflicting as to whether defendant was the father of the child it was prejudicial error to exclude evidence that, at about the time of probable conception, the complainant had associated with other men under suspicious circumstances. *DeMund v. State,* 40

BENEFIT ASSOCIATIONS. See INSURANCE, 8–15.

BILL OF EXCEPTIONS. See APPEAL, 8.

BILLS AND NOTES.

Negotiability: Contract affecting time of payment: Notice to purchaser.

1. A finding by the jury that at the time of purchasing the notes in suit the plaintiff bank had, through its president, who was also an officer of the vendor of the lighting plant, actual notice of the contents of the written contract of sale, which contained provisions affecting the time of payment of the notes, is *held* to be sustained by the evidence. *Bank of Evansville v. Kurth,* 43
2. Construing together a contract for the sale of a lighting plant and promissory notes given for a part of the price, the notes were, as to persons with knowledge of the terms of the contract, rendered nonnegotiable (under sub. (3), sec. 1675—1, Stats.) by a provision in the contract under which the time of payment of the notes was uncertain and might never occur if the plant failed to earn more than needed repairs. *Ibid.*

Title to notes: Gift by father to son. See GIFTS.

Actions: Nonresident maker. See LIMITATION OF ACTIONS.

Same: Right to enforce payment: Notes given under land contract: Strict foreclosure. See VENDOR AND PURCHASER, 4, 5.

Same: Defenses: Fraud. See SALES, 1.

BONDED CARRIERS. See MASTER AND SERVANT, 15.

BONDS.
Of contractors. See PRINCIPAL AND SURETY.
Of sheriffs. See EXECUTION, 4–6.

BOOKS OF ACCOUNT: Evidence. See BANKS AND BANKING, 5.

BRIDGES.

Superintending construction: Claim for compensation. See COUNTIES.

Maintenance by counties: Invalid statute.

Sec. 1325*i*, Stats. 1915, providing that public bridges *heretofore constructed* across waters forming county boundaries shall be operated, maintained, and repaired at the joint expense (apportioned as there stated) of the counties directly joined thereby, violates sec. 23, art. IV, Const., which requires a uniform system of town and county government—the classification made by said statute being based upon circumstances as they existed at the time of its enactment alone, and not permitting any subsequent additions to the class in question. *State ex rel. Johnson v. County Boards,* 417

BROKERS.

1. Three brothers who, without authority, assumed to act for other brothers and sisters in employing a real-estate broker to sell a farm belonging to them all, were personally liable for the whole commission of the broker, where his employment was not assented to or ratified by the others. *Roberts v. Goodlad,* 318
2. A finding by the jury that after defendants had made a written contract with a broker it was agreed orally that he should receive a commission larger than that stated in the writing, is *held* not to be sustained by the evidence, which showed only loose or casual talk between the broker and one of the defendants, practically contemporaneous with the writing. *Ibid.*
3. In an action by brokers to recover a commission claimed to have been earned by procuring a purchaser able, ready, and willing to buy defendant's land on the terms agreed upon, the direction of a verdict in defendant's favor is *held* error, the questions whether the purchaser was to have a reasonable time, after examination of the abstract, to make an agreed down payment of $50,000, whether such time had expired when the defendant withdrew the property from the market, and whether, by giving notice of such withdrawal, defendant intended to terminate the contract, so that further attempted compliance with the terms of the agreement of sale was unnecessary,—being upon the evidence questions for the jury. *Boardman v. Courteen,* 625

BUILDING CONTRACTS. See MUNICIPAL CORPORATIONS, 3–6. PRINCIPAL AND SURETY.

BURDEN OF PROOF. See INSTRUCTIONS TO JURY, 3. QUO WARRANTO. RAILROADS, 4. WORKMEN'S COMPENSATION, 11.

CALENDARS: Court and jury. See TRIAL, 1.

CARRIERS.

Carriage of goods: Stoppage in transit: Rights and liabilities of carrier: Bankruptcy of vendee.

1. Upon the exercise of the right of stoppage *in transitu* the carrier must, at its peril, deliver the goods to the person entitled to them. If in doubt, it should insist upon full investigation and may retain possession until it is satisfied; or, if both vendor and vendee are demanding the goods and threatening suit therefor, it may by interpleader compel them to settle the question between themselves. *Morgan v. Chicago & N. W. R. Co.* 48
2. Where the vendor of lumber shipped it to Chicago but, upon learning of the vendee's bankruptcy, duly stopped it in transit while it was still in Wisconsin, the carrier did not, by afterwards transferring the lumber to its station yards in Chicago, convert it or become liable to the vendor for its value, the vendor not being injured by such transfer, since the carrier did not thereby part with possession of the lumber or render itself unable to comply with its duty to the vendor. *Ibid.*
3. The fact, in such case, that after reaching Chicago the lumber was, pursuant to an order of the bankruptcy court, delivered to the receiver of the vendee, did not render the transfer to Chicago a conversion, since the same court might have compelled such delivery if the lumber had remained at the place of stoppage. *Ibid.*

4. A carrier cannot be held responsible for goods taken from its custody by valid legal process, provided it gives the owner prompt notice of the suit so that he may have an opportunity to protect his interest. *Ibid.*

5. Where the vendor of lumber stopped it in transit but, pursuant to a summary, *ex parte* order of a bankruptcy court, the carrier thereafter delivered it to the vendee's receiver in bankruptcy, such order constituted "legal process, fair on its face," relieving the carrier from liability to the vendor if the carrier promptly notified him of such action. *Ibid.*

6. The jurisdiction of the bankruptcy court to make such summary order cannot be questioned collaterally in an action in a state court by the vendor against the carrier to recover the value of the lumber. *Ibid.*

7. Whether a bankruptcy court has jurisdiction to proceed in a summary manner to vest its receiver with possession of property claimed to belong to the bankrupt's estate depends upon the facts disclosed by the record from time to time, and, while it may have jurisdiction to institute such proceedings, it may be ousted of such jurisdiction by a presentation of facts showing that the title to such property is claimed by another, in which case such other is entitled to have his right to the possession determined in a plenary suit. *Ibid.*

8. Even if the order of the bankruptcy court was not "legal process, fair on its face," the delivery of the lumber to the receiver did not render the carrier liable to the vendor, since the receiver's claim of the right of possession raised a controversy which the carrier had no power to determine, and the property was not by such delivery lost to the vendor, but was turned over to a proper tribunal in which the vendor might assert his claim. *Ibid.*

9. The carrier was not bound, in such case, to go into the bankruptcy court and establish the vendor's right to the lumber, but only to notify the vendor promptly of what had been done; and the vendor slept upon his rights by not appearing seasonably in that court to establish his claim. *Ibid.*

10. After issue was joined in this action by the vendor against the carrier for the value of the lumber, in correspondence between the attorneys of the respective parties it was asked on behalf of the carrier whether the vendor would settle for a certain sum if the carrier could obtain a refund of that amount from the bankruptcy court, and the reply was that the vendor would accept that amount but that, as no definite offer of settlement had been made, he would notice this action for trial and proceed as if there had been no negotiations. *Held*, that the carrier did not thereby assume responsibility for recovering the value of the lumber from the bankrupt estate, and since there was nothing to indicate that the vendor had intended to present a claim in the bankruptcy court or that his conduct was in any way influenced by the correspondence, the carrier was not estopped from contending that the vendor should have sought a remedy in said court. *Ibid.*

Carriage of live stock: Place of delivery: Breach of contract: Misrouting.

11. Where by the contract of carriage a carload of horses shipped in this state was to be delivered at "Allentown Fair Grounds, Allen-

town, Pa.," but the delivery carrier left the car at Allentown station, and the shipper was obliged to hire and pay another carrier to transport it to the fair grounds seven miles distant, the claim to recover the amount paid to such other carrier is not based on a misrouting, under the interstate commerce acts, but is a claim for damages based on breach of the contract to deliver the shipment at the destination specified, and is enforceable in the state courts. *Wooster v. Chicago & N. W. R. Co.* 6

Same: Negligent delay: Damages.

12. The question whether defendant, the initial carrier, negligently delayed the forwarding of plaintiff's horses is *held* to have been, on the evidence, one for the jury and to have been submitted under proper instructions as to the promptness and diligence required in such cases. *Wooster v. C. & N. W. R. Co.* 6

13. An award of $125 (reduced by the trial court from $175) for injuries to horses caused by negligent delay in transporting them is *held* to be sustained by the evidence. *Ibid.*

Carriage of passengers: Unsafe waiting room: Licensee.

14. One who was in the waiting room of a railway station in good faith, reasonably expecting the arrival of her son on a train, was not a mere licensee although no definite time or particular train was fixed for the son's arrival, and the railway company owed to her the duty of constructing and maintaining the premises in a reasonably safe condition. *Himstreet v. Chicago & N. W. R. Co.* 71

15. Where plaintiff while so in defendant's waiting room went to a window which gave a convenient view of the trains and, after looking to see if her son was on an incoming train, in stepping back fell down a lighted stairway the top of which was close by, the questions as to defendant's negligence and plaintiff's contributory negligence were both for the jury, in view of the location of the window and its surroundings. *Ibid.*

Same: Bonded carriers: Jitneys: Injury to passenger. See MASTER AND SERVANT, 15.

CAUSE OF ACTION: When accrues. See BANKS AND BANKING, 1. INSURANCE, 14.

CHANGE OF VENUE. See VENUE.

CHECKS: Fraudulent issuance. See BANKS AND BANKING, 4, 5.

CHILD LABOR. See EVIDENCE, 1, 2. FRAUD, 2.

CHURCH CLUBS. See TAXATION, 2.

CIRCUIT COURTS. See COURTS.

CITIES. See MUNICIPAL CORPORATIONS.

CIVIL COURT. See APPEAL, 9.

CLAIMS.
Against counties. See COUNTIES.
Against cities. See MUNICIPAL CORPORATIONS, 16.
Against decedents. See EXECUTORS.

CLASSIFICATION. See BRIDGES. CONSTITUTIONAL LAW, 4–7.

CO-EMPLOYEES. See MASTER AND SERVANT, 11.

COLLATERAL ATTACK. See CARRIERS, 6.

COLLISIONS. See ASSIGNMENTS. CONTRIBUTION, 2. RAILROADS, 13, 14.

COMMERCE: Interstate. See CARRIERS, 11. MASTER AND SERVANT, 3–11.

COMMISSIONS. See BROKERS.

COMMON CARRIERS. See CARRIERS.

COMMON LAW: Ancient statutes. See DOWER.

COMPENSATION.
For injuries. See WORKMEN'S COMPENSATION.
For property taken for public use. See EMINENT DOMAIN. MILLS AND MILLDAMS. MUNICIPAL CORPORATIONS, 8. RAILROADS, 11, 12.

COMPLAINT. See PLEADING.

COMPROMISE AND SETTLEMENT. See MASTER AND SERVANT, 12, 13.

CONDEMNATION OF LAND. See RAILROADS, 11, 12.

CONDITIONS.
Precedent. See CONTRACTS, 11, 12. COSTS, 1.
Subsequent. See DEEDS, 4, 5. PERPETUITIES.

CONFIDENTIAL RELATIONS. See GIFTS.

CONFLICT OF LAWS. See MARRIAGE, 1–5.

CONSENT to change of place of trial. See VENUE, 2, 5.

CONSIDERATION. See CONTRACTS, 16. EVIDENCE, 6. FRAUD, 6. PARTNERSHIP, 3.

CONSTITUTIONAL LAW.

Legislative powers: Delegation: Vacation of streets. See RAILROADS, 10.

Police power: Public health: Regulating tenements, etc.: Retroactive statutes.

1. Sec. 1636—195, Stats. 1915 (providing that in cities of the first class "no room in the cellar or basement of any apartment, tenement, lodging or boarding house shall be . . . occupied for living purposes unless" certain conditions as to height of ceiling from floor and above level of the lot, window openings, etc., are complied with), applies to buildings existing when the law was enacted in 1909, but is not for that reason retroactive, since it operated only upon conditions existing after it went into effect. *Nelson v. State,* 515
2. Such a law is a valid exercise of the police power to prescribe reasonable regulations for the preservation of the public health, even though it may affect property rights by requiring the remodeling of basement tenements, notice to owners and a reasonable time for compliance being provided for. *Ibid.*
3. Determination of what is reasonable in such a case is generally a legislative function the exercise of which will not be interfered with by the courts unless clearly exceeding the bounds of reason. *Ibid.*

Same: Licensing of bakeries: Classification: Exemption from fees.

4. Assuming that ch. 648, Laws 1917 (secs. 1410*d*—1 to 1410*d*—8, Stats. 1917), relating to the regulation and licensing of bakeries and other similar establishments, is an exercise of the police power in the interest of the public health, and that the prescribed license fees are not exacted for revenue purposes but merely to meet the expense of licensing and supervising such establishments, it is *held* that the amount of baking surface operated is a proper basis for a classification of bakeries, such as is made in sec. 7 of the act (sub. 2*a*, sec. 1410*d*—6, Stats. 1917), which fixes at $5 the license fee for operating a bakery

having more than twenty and less than fifty-one square feet of baking surface, and at $10 the fee for a bakery having fifty-one or more square feet of baking surface. *Wisconsin Asso. of Master Bakers v. Weigle,* 569

5. A classification made by the legislature upon a proper basis cannot be held invalid, even though a more just classification may be suggested, unless it is clear beyond a reasonable doubt that there are no legitimate reasonable grounds for the classification made. *Ibid.*

6. In the exercise of the police power of the state the legislature is limited by the constitutional provision that restraints and burdens imposed shall affect all persons equally; but persons and property may be separated into classes, provided they have characteristics legitimately distinguishing the members of one class from those of another in respects germane to some general public purpose. *Ibid.*

7. The licensing and inspection of all bakeries being required, in the interest of public health, by the act of 1917, the legislature had power to classify bakeries and determine the amount of license fees to be paid in each of the respective classes, but had no power to exempt a part of the licensees from the payment of any fee and thus cast the whole burden upon the nonexempted classes. Hence sec. 7 of the act, fixing the license fees to be paid by bakeries in the other classes, but wholly exempting from any such payment all bakeries operating less than twenty square feet of baking surface, is invalid. *Ibid.*

County government: Uniformity. See BRIDGES.

Vested rights. See CONSTITUTIONAL LAW, 2.

Eminent domain: Compensation for property. See EMINENT DOMAIN. MILLS AND MILLDAMS. MUNICIPAL CORPORATIONS, 8. RAILROADS, 11, 12.

Right to trial by jury. See JUVENILE COURTS, 1. TRIAL, 1.

Due process of law. See JUVENILE COURTS, 2.

Cruel and unusual punishments. See PHYSICIANS AND SURGEONS, 3.

Equal protection of the laws. See CONSTITUTIONAL LAW, 6, 7.

CONTRACTS.

Validity: Competency of parties. See DEEDS, 1–3. HUSBAND AND WIFE, 2.

Same: Formal requisites: Statute of frauds. See LANDLORD AND TENANT, 1. VENDOR AND PURCHASER, 1, 2.

Same: Consideration. See CONTRACTS, 16. FRAUD, 4–6. PARTNERSHIP, 3.

Same: Legality of object: Public policy. See DIVORCE, 9. WATERS, 5. WILLS, 4.

Same: Contracts with foreign corporations: Affirmance. See CORPORATIONS.

Consideration: Parol evidence. See EVIDENCE, 6.

Construction. See BILLS AND NOTES. INSURANCE, 4–6. LANDLORD AND TENANT, 2. MUNICIPAL CORPORATIONS, 3–5. PARTNERSHIP, 1–10. PRINCIPAL AND SURETY, 2–4, 7.

Same: Contracts for benefit of third persons. See MUNICIPAL CORPORATIONS, 3, 4. PRINCIPAL AND SURETY, 1, 7.

Same: Entire or severable contract.

1. Where plaintiffs paid or agreed to pay a gross sum for certain equipment and for the procurement of an agency and it cannot be said that any definite part of that sum was for the one thing or the other, the contract is not separable. *Krause v. Reichel,* 360

Same: Building contracts. See MUNICIPAL CORPORATIONS, 3–6. PRINCIPAL AND SURETY.

Same: Government work: Abandonment: New contract with sureties: Payments, etc.

2. O. & C., after partially completing certain work which they had contracted to do for the United States government, became bankrupt, and the government, under the contract, took possession of the work and of all materials, tools, animals, etc., which the contractors had been using thereon. Defendant company, which was surety on the bond of O. & C., thereafter made with plaintiffs the contract in suit, which was to be effective only in case defendant should make, as it in fact did, a new contract (known as the Garfield contract) with the government for the completion of the work by defendant in accordance with the original contract of O. & C. but with an extension of time. The contract in suit provided that plaintiffs should complete the work begun by O. & C. in the same manner as if they had been the original contractors, and that "the moneys to be paid" to them "therefor shall be the sum or balance to be paid by the United States under the contract of" O. & C., "which sum or balance is understood to be $641,137.34, to which is to be added and paid by the United States" certain "hold-backs" (*i. e.* percentages reserved when payments were made to O. & C.) aggregating $45,000, and certain penalties (incurred by O. & C. for delays) aggregating $7,050; "and the further sum of $14,050 to be paid by the" defendant to plaintiffs. It was provided that defendant should assign all warrants and pay over to plaintiffs all money received by it from the United States upon estimates of work done and for hold-backs and penalties, and, in addition, pay to plaintiffs "the sum of $14,050 and no more, which latter sum shall be in full for all other obligations and liabilities" of the defendant to the plaintiffs; and that it was the true intent of the parties that plaintiffs should "look to the payments to be made by the United States for their compensation," and that defendant should not be liable to plaintiffs for any greater sum than $14,050. *Held,* that defendant assumed an absolute liability to plaintiffs for the sum of $14,050 only, and not for the balance unpaid by the government on the contract of O. & C. or for the hold-backs or penalties, but that defendant was not a mere trustee for plaintiffs or a mere conduit through which the money paid by the government was to pass to them, and was bound to use reasonable diligence to collect moneys due to it under the Garfield contract; and that each party was bound to assist, whenever necessary, in taking the required steps to obtain the amount which the government was willing to pay for the work as it went on or which should finally become due on the completion of the work. *Peters v. Nat. Surety Co.* 131

3. Plaintiffs were not mere assignees of the Garfield contract between defendant and the government, an assignment of such a

contract being prohibited by the federal statute; and neither party can be heard to assert that there was in effect such an assignment. *Ibid.*

4. Upon the evidence showing that plaintiffs received and retained without protest a copy of said Garfield contract between defendant and the government, it is *held* that they were chargeable with knowledge of its contents, and cannot be heard to say that they relied upon telegrams from defendant which might have led them to a different understanding as to its contents. *Ibid.*

5. The Garfield contract not having provided in any way that the government would pay to defendant the penalties of $7,050 which had been incurred by O. & C., and there having been no suggestion on the part of the government that it would pay or remit said penalties, and plaintiffs not having, prior to the final settlement between the government and defendant under said contract, suggested or demanded that defendant require such a favor from the government, the defendant is not liable to plaintiffs for the amount of such penalties. Defendant cannot be held so liable on the speculative theory that such a favor might have been granted if some one had asked for it. *Ibid.*

6. By the Garfield contract the government permitted defendant to have the possession and use of the material, tools, animals, etc., which had been used on the work by O. & C., and by the contract in suit defendant agreed that plaintiffs might have the use, without charge during the progress of the work, of said property of O. & C. of which the government had taken possession, and further agreed that it would protect and defend plaintiffs against a superior claim on the part of any other person affecting the possession of any of said property. Afterwards one Y. claimed to be the owner of a part of the property so turned over to plaintiffs, and after some controversy in which the government declined to take any part, and after defendant had denied any responsibility in the matter, plaintiffs bought from Y. the property claimed by him and thereafter sold part of it so that the net cost to them was $4,469.47. *Held* that, construing the contract in the light of the evidence, defendant's guaranty to plaintiffs of possession and use was not limited to property actually owned by O. & C., but extended to the property in question which was in the possession of and used by O. & C. and was afterwards taken possession of by the government; and hence that defendant was properly held liable for the net cost to plaintiffs of the Y. property. *Ibid.*

7. Defendant having elected to deny all responsibility in the matter of Y.'s claim, was bound by such election and was not thereafter entitled to have the plaintiffs tender to it the defense of any lawsuit between them and Y. *Ibid.*

8. After the government had taken possession of the work left incomplete by O. & C. it continued such work for a time and purchased further materials and supplies, some of which were at the work and were turned over to plaintiffs after the contract in suit was made. Both plaintiffs and defendant assumed that these were a part of the plant, but a deduction therefor was made by the government in the first statement or estimate upon which a payment was made to defendant under the Garfield contract, and the same item appeared as a deduction in the subsequent estimates. A finding of the trial court that

the claim of the government as to this property was a superior claim against which defendant had agreed to protect plaintiffs, and its conclusion that defendant was liable for the amount so deducted by the government, are *held* to be sustained by the evidence. *Ibid.*

9. Mere tacit acquiescence by plaintiffs in said deduction so far as the government was concerned in its dealings with defendant under the Garfield contract did not amount to a waiver of their claim as against the defendant under the contract in suit. *Ibid.*

10. An unqualified admission by defendant of a liability as to both of the items above mentioned (the property claimed by Y. and the deduction made by the government), although not for the full amounts claimed by plaintiffs, was a substantial ground for the findings and conclusions of the trial court in respect to said items. *Ibid.*

11. The filing, with the government, of a certificate of the government engineer as to the completion of the work, though required by the Garfield contract and by the original contract with O. & C., was not a condition precedent to defendant's liability, under the contract in suit, to make payments to plaintiffs. The requirement as to such certificate was for the protection of the government, and the duty to obtain it rested primarily upon the defendant. *Ibid.*

12. Although by the contract in suit plaintiffs agreed to pay for all materials, labor, and supplies furnished or used in the work and to discharge any attachments or liens therefor, such payment and discharge was not a condition precedent to their right to maintain this action for the balance due them under the contract; the defendant having ample security by withholding funds sufficient to cover the unpaid claims, or by requiring the claimants to be made parties to the action. *Ibid.*

13. Upon completion of the work, the government officials decided that the hold-backs above mentioned should properly be paid to the trustee in bankruptcy of the original contractors, O. & C. Thereupon defendant, after consultation with plaintiffs, brought and successfully prosecuted an action to recover such hold-backs, and the amount thereof was paid to it as provided in the Garfield contract. *Held*, that the steps so taken by defendant to obtain said moneys were a part of its obligation to the plaintiffs and that it was not entitled to have the expenses incurred in prosecuting said action allowed to it as a counterclaim against the plaintiffs. *Ibid.*

Same: Interest.

14. For the collection by defendant of the amounts due from the government upon completion of the Garfield contract and payment thereof to plaintiffs, thirty days after the final estimate is *held* to be a reasonable time, and defendant should not be held liable for interest upon said amounts prior to the expiration of said thirty days. *Peters v. Nat. Surety Co.* 131

15. As to the deduction made by the government, as above stated, in the estimates under the Garfield contract, on account of "supplies and materials purchased by the United States and turned over to" defendant, the language of such item did not necessarily, as a matter of law, notify defendant that such a deduction was a superior claim against the property turned over to plaintiffs, for which it must be responsible under the contract

in suit, or that it must forthwith pay such sum to plaintiffs in order to avoid liability; and no demand for the payment of said sum having been made by plaintiffs prior to the commencement of this action, defendant should be charged with interest thereon only from the date of such commencement. *Ibid.*

Rescission: Inadequate consideration. See FRAUD, 4–6.

16. Mere inadequacy of consideration is not ground for rescission unless so gross as, of itself, to prove fraud. *Krause v. Reichel,* 360

Enforcing specific performance. See LANDLORD AND TENANT, 1.

Performance or breach. See MASTER AND SERVANT, 1. TRUSTS, 1.

Actions for breach. See CARRIERS, 11. EVIDENCE, 5. JUDGMENT, 1.

Parol evidence affecting writings. See EVIDENCE, 6. SALES, 1.

CONTRIBUTION.

Between joint tortfeasors.

1. The rule that there can be no contribution between joint tortfeasors is not applicable to a case in which there was no moral turpitude and no wilful or conscious wrong. *Ellis v. Chicago & N. W. R. Co.* 392

2. Thus, where judgment is rendered against both a railway company and a traction company for damages on account of personal injuries sustained in a collision between a train and an interurban car, and though both were negligent, one in failing to ascertain that the train was coming and the other in running the train at an unlawful speed, yet it appears that there was no wilful or conscious wrong, the company which pays the whole judgment may compel contribution from the other. *Ibid.*

Same: Conclusiveness of judgment against one. See JUDGMENT, 3–5. PARTIES.

3. Where, in an action against independent tortfeasors whose concurring wrongful acts were alleged to have caused an injury, judgment was rendered in favor of one defendant, but in plaintiff's favor against the other, the defendant so held liable may bring his action for contribution against the other defendant and the latter cannot in such action use the judgment in the tort action for the purpose of showing that his wrong did not concur in producing the injury. *Bakula v. Schwab,* 546

CONTRIBUTORY NEGLIGENCE. See CARRIERS, 15. HIGHWAYS, 1, 2, 5. MASTER AND SERVANT, 10. MUNICIPAL CORPORATIONS, 15. NEGLIGENCE, 2. RAILROADS, 15, 16.

CONVERSION. See CARRIERS, 2, 3. COURTS, 2.

CONVEYANCES. See DEEDS. EVIDENCE, 6. PERPETUITIES. PLEADING, 1. REPLEVIN. VENDOR AND PURCHASER, 3.

CORPORATIONS.

Stock: Subscription: Foreign corporation: Stockholders' liability.

1. Where a resident of this state, through transactions carried on wholly within the state, subscribed and paid for and received stock in a Minnesota corporation which had not complied with the requirements of sec. 1770*b*, Stats., so as to entitle it to transact business in this state, such contract was one affecting the personal liability of the corporation and is governed by sub. 10, and not by sub. 2, of said sec. 1770*b*. *Allen v. Fulton,* 352

2. Where, after such contract of subscription was fully executed, the subscriber owned and retained the stock for a number of years, he must be deemed to have elected to affirm the contract and, as a lawful stockholder, he may, in an action by a receiver of the corporation on behalf of its creditors, be held upon the stockholders' liability created by the law of Minnesota. *Ibid.*

Same: Contract to transfer stock. See EVIDENCE, 5.

Partnership with individual: Dissolution of corporation: Rights of surviving partner. See PARTNERSHIP, 14.

COSTS.

1. Sec. 2894*a*, Stats., requiring the successful party to perfect judgment within sixty days after verdict or forfeit costs, does not apply in case of a special verdict finding the facts only. The sixty days does not begin to run in such case until the court decides who is the successful party. *Stryk v. Mnichowicz*, 265

2. Where, in a foreclosure action, the mortgagor impleaded certain insurance companies and obtained judgment requiring them to pay the amount of a loss into court to be applied upon the mortgage, the awarding of costs to the mortgagor against said companies was not an abuse of discretion. *Lumbermen's Nat. Bank v. Corrigan*, 82

COUNTERCLAIM. See CONTRACTS, 13. DIVORCE, 4. MARRIAGE, 5. MUNICIPAL CORPORATIONS, 5, 6. PARTNERSHIP, 11–13. REPLEVIN. UNLAWFUL DETAINER.

COUNTIES.

Uniformity in county government: Constitutional law. See BRIDGES.

Aid to poor persons. See MUNICIPAL CORPORATIONS, 16.

Claims against county: Superintending construction of bridges.

Where a town chairman was, by virtue of sub. 8 (4), sec. 1317*m*—5, Stats. 1915, *ex officio* a member of the county state road and bridge committee, and as such member, but without any specific direction of the committee, superintended the construction of certain bridges in the town, and where such committee, which might in the first instance have authorized him to do such work, with full knowledge of the facts approved his bill for the compensation specified in sub. 8 (1), sec. 1317*m*—5, Stats. 1915, and recommended its allowance by the county board, there was a complete ratification of his acts, and his claim, being legal and just, could not lawfully be disallowed. *Wade v. Sheboygan County*, 98

COUNTY COURTS. See COURTS, 2, 3. DRAINS, 5. PARENT AND CHILD, 2, 5.

COURTS.

Supreme court: Appellate jurisdiction. See APPEAL AND ERROR.

Same: Supervisory control over lower courts. See COURTS, 1.

Circuit courts: Jurisdiction. See NEW TRIAL, 2.

Same: Conflicting claims to jurisdiction of action.

1. A circuit court which had dismissed, for want of prosecution, an action of which it had jurisdiction through valid changes

of venue, cannot restrain the plaintiff from proceeding with the action in the circuit court in which it was originally commenced and which claims still to have jurisdiction thereof. The defendant, in such case, should appear in the last mentioned court and protest against further proceedings therein, and if that court persisted should invoke the supervisory control of the supreme court. *Stahl v. Broeckert,* 113

Same: Concurrent jurisdiction with county courts. See PARENT AND CHILD, 2, 5.

2. The circuit court will not entertain an action by legatees against the executors and others for an alleged conversion of assets belonging to an estate which is being administered in the county court, the remedy in the latter court being adequate. *Lehman v. Weiner,* 428

3. If in such a case the proceedings in the county court have terminated and the executors have been discharged, the appointment of an administrator *de bonis non* may be procured and he may proceed to collect the unadministered assets. *Ibid.*

County courts. See COURTS, 2, 3. DRAINS, 5. PARENT AND CHILD, 2, 5.

Juvenile courts. See JUVENILE COURTS.

CRIMINAL LAW AND PRACTICE.

See BANKS AND BANKING, 4, 5. HOMICIDE. INFANTS. JUVENILE COURTS, 1. PHYSICIANS AND SURGEONS. RAPE. RECEIVING STOLEN PROPERTY.

Evidence: Relevancy: Opinions: Harmless errors.

1. In a prosecution under sec. 4583, Stats., for using instruments in the treatment of a pregnant woman with intent to procure a miscarriage, evidence that defendant was instrumental in not having the woman taken to a hospital for care and treatment was relevant and was properly received; and another physician, who examined and treated the woman after defendant had had her in charge, was properly permitted to give his opinion, based on her condition and age, that a miscarriage does not often occur in such cases unless artificial means are employed. *Rodermund v. State,* 577

2. In such a case the admission in evidence of a statement made by the woman to her sister in the absence of defendant, concerning her visit to the defendant's office, having relation only to facts which were practically uncontroverted and appeared by other evidence in the case, is *held* not to have been prejudicial error. *Ibid.*

Same: Competency: Bank books. See BANKS AND BANKING, 5.

Same: Weight and sufficiency. See BANKS AND BANKING, 4. HOMICIDE, 3, 4.

Instructions to jury. See RECEIVING STOLEN PROPERTY.

Setting aside verdict: New trial. See HOMICIDE, 4.

3. Where alleged newly discovered evidence tended to prove an *alibi* which was but a branch of an *alibi* which defendant had attempted to establish at the trial, and his attorney was aware of such evidence before the close of the trial, a new trial was properly denied. *Simmons v. State,* 36

Second offense: Severer punishment.

4. Sec. 4738, Stats., authorizing severer punishment for a second offense, applies where there had been a former conviction for an offense punishable by fine only; and one who had, as required by sec. 4633, been sentenced to imprisonment until his fine should be paid, had been "sentenced to imprisonment" within the meaning of said sec. 4738. *State v. Jacobs,* 299

CROSS-COMPLAINT. See PLEADING, 2.

CRUEL AND UNUSUAL PUNISHMENT. See PHYSICIANS AND SURGEONS, 3.

DAMAGES.

Compensatory. See CARRIERS, 13. CONTRACTS, 14, 15. DRAINS, 2, 4, 5. EMINENT DOMAIN. EVIDENCE, 4. HOSPITALS, 2. MASTER AND SERVANT, 10. MILLS AND MILLDAMS. RAILROADS, 12. TELEGRAPHS, 1, 2. TRIAL, 2.

Punitory or exemplary. See TELEGRAPHS, 3, 4.

1. A party is never entitled to have punitory damages assessed; their assessment, when the proper facts are shown, being in each case a matter within the sound discretion of the jury. *Marlatt v. W. U. Tel. Co.* 176

Excessive.

2. Upon evidence that, as a result of personal injuries, plaintiff incurred expense of about $500, was confined to her bed for four months, and suffered much pain, an award of $2,000 (reduced to that amount from $3,000 awarded by the jury) is *held* not excessive. *Bakula v. Schwab,* 546

Remission of part of damages: Curing errors. See APPEAL, 11. NEW TRIAL, 2, 3.

DAMS. See MILLS AND MILLDAMS. WATERS.

DEATH. See INSURANCE, 12–15. MASTER AND SERVANT, 2–11. WORKMEN'S COMPENSATION, 1, 2, 10, 11, 17, 18.

DEBTOR AND CREDITOR. See BILLS AND NOTES. BROKERS. CARRIERS, 5–9. CONTRACTS, 13–15. EXECUTION. INSURANCE, 10. JUDGMENT, 1. LIMITATION OF ACTIONS. MORTGAGES. MUNICIPAL CORPORATIONS, 16. PARTNERSHIP, 15. PRINCIPAL AND SURETY. SALES. WILLS, 4.

DEEDS.

Validity: Mental competency of grantor: Evidence.

1. Findings by the jury to the effect that a defendant procured the conveyance to him by plaintiff of real and personal property at a time when plaintiff was, and defendant should have known he was, mentally incapable of contracting, are *held* to be sustained by the evidence; and the findings as to the value of such property are *held* to be well supported and not to indicate passion or prejudice. *Pawlak v. Pelkey,* 367

2. A report, made in September, 1914, by the examining physicians in an inquisition as to the sanity of a person, to the effect that he was sane, bore very remotely, if at all, upon the question of the competency of that person to contract in July, 1915; and the exclusion of such report was not error. *Ibid.*

3. An offer, by a defendant who procured a conveyance of property from the plaintiff at a time when the latter is alleged to have been mentally incompetent to contract, to show that soon afterwards he asked the town board to take the deed in their name and pay the debts on the property, the offer being made for the purpose of showing good faith on the part of the defendant, was properly refused, such evidence being incompetent. *Ibid.*

Same: Execution induced by fraud. See PLEADING, 1.

Same: Suspension of power of alienation. See PERPETUITIES.

Consideration. See EVIDENCE, 6.

Incumbrances: Fraud. See REPLEVIN.

Title: Ability of grantor to convey fee. See VENDOR AND PURCHASER, 3.

Conditions subsequent: Validity. See PERPETUITIES.

Same: Breach: Remedy: Pleading.

4. One who claims title to land by reason of the breach of a condition subsequent contained in a conveyance thereof should proceed by an action at law; but if his complaint states facts constituting a cause of action in ejectment, a demurrer thereto should be overruled, even though the prayer be for equitable relief. *Williams v. Oconomowoc,* 281

5. A complaint in such case containing no formal allegation that there has been a re-entry on account of the breach of condition does not state a good cause of action in ejectment. *Ibid.*

DEFAULT. See APPEAL, 7.

DEFENSE: Tender of. See CONTRACTS, 7.

DEFINITIONS. See WORDS AND PHRASES.

DEGREES of manslaughter. See HOMICIDE.

DELEGATION of legislative power. See RAILROADS, 10.

DELIVERY. See EXECUTION, 3.

DEMAND.
Of payment. See CONTRACTS, 15. INSURANCE, 14.
For change of place of trial. See VENUE, 1, 3, 4.

DEMURRER. See PLEADING, 2.

DEPRECIATION of lots from vacation of part of street. See EMINENT DOMAIN.

DESCRIPTION OF LAND. See VENDOR AND PURCHASER, 2.

DISCRETION. See COSTS, 2. DAMAGES, 1. PARTIES.

DISCRIMINATION. See CONSTITUTIONAL LAW, 7.

DISMISSAL of action. See PROCESS, 2.

DISSOLUTION of partnership: Creditors' rights. See PARTNERSHIP, 14, 15.

DITCHES. See DRAINS.

DIVISION OF PROPERTY. See DIVORCE, 6–12.

DIVORCE.

See DOWER, 2.

Jurisdiction, proceedings, and relief after judgment: Marriage before judgment becomes absolute.

1. During one year after entry of a judgment of divorce the court has absolute control over the question whether the party seek-

ing a divorce is entitled thereto; and that which has been granted conditionally by the judgment may be forfeited by violation of the conditions. *White v. White,* 615

2. The provision in sec. 2360, Stats., that "no decree for divorce shall be granted if it appears . . . that the plaintiff . . . has been guilty of adultery not condoned," is applicable during the year subsequent to the trial and entry of judgment; and if such fact appears at any time before the judgment becomes absolute it is "sufficient cause," under sec. 2374, for vacating or modifying the judgment. *Ibid.*

3. In its disposition of a divorce action a court is not confined to the facts as they existed when the action was commenced, but may take cognizance, under proper pleadings, of what is done by either party during the pendency of the action. *Ibid.*

4. Where within a year after the entry of a divorce judgment the defendant wife moves to vacate the judgment on the ground that the plaintiff has married again, she should be permitted, under sec. 2687, Stats., to file a supplementary answer alleging adultery by plaintiff subsequent to the trial, either as a bar to his prayer for divorce or, by way of counterclaim, as ground for a divorce in her favor. Such method of determining the matter is deemed the better practice. *Ibid.*

Same: Appealable orders. See APPEAL, 1, 2.

Allowances to wife.

5. A divorce action being pending at least until the judgment entered therein becomes absolute, an allowance to the wife for attorney's fees on her application, made within the year, to vacate such judgment, may be made under sec. 2361, Stats. *White v. White,* 615

Division of property.

6. The subject of divorce and distribution of property in divorce proceedings is regulated by statute in this state, and the distribution in any particular case must be one authorized by the statute. *Martin v. Martin,* 255

7. The theory of our divorce statutes is to provide for an equitable division of the property of the parties, including such property of the wife as shall have been derived, either mediately or immediately, from the husband. *Ibid.*

8. Money and labor put by the husband into the wife's property, greatly enhancing the value of her estate, constitute estate "derived from the husband," within the meaning of sec. 2364, Stats. *Martin v. Remington,* 100 Wis. 540; *Frackelton v. Frackelton,* 103 Wis. 673, and other cases, distinguished. *Ibid.*

9. An agreement between husband and wife that property originally purchased with the wife's money, but into which the husband had put money and labor greatly enhancing its value, should be sold and that out of the proceeds a definite sum should be paid to the husband as a full and final division of the estate and property of the parties, is *held* in this case to be void as against public policy. *Ibid.*

10. Independent of said void agreement, the division of property therein provided for is, upon the evidence in a divorce action between the parties thereto, *held* to be a just and equitable division. *Ibid.*

11. A divorce judgment awarding all the property of the parties to the wife, subject to the payment of a certain sum to the husband as his share therein, but not adjudging any personal liability against the wife for such payment, is valid and proper. *Gallagher v. Gallagher*, 89 Wis. 461, distinguished. *Ibid.*

Same: Control by court after entry of judgment.

12. The plaintiff husband having in this case voluntarily paid, and the wife having received, the sum stipulated and adjudged to be paid as a final division of the husband's estate, it is not decided whether compliance with such a provision for a final division could be compelled before the expiration of the year after entry of judgment; but under the further proceedings which must be taken upon a supplementary answer herein the sum so paid may still be controlled by the court as plaintiff's property and may be considered and disposed of in the final determination of the action, due allowance being made to the defendant for whatever she may reasonably and properly have expended. *White v. White*, 615

Marriage within year after judgment: Validity.

13. Where an interlocutory decree of divorce was properly entered under ch. 323, Laws 1909, the final judgment was properly entered under the regulations of and with the effect provided for in said law of 1909, even though not applied for until after the enactment of ch. 239, Laws 1911 (which provides that the judgment entered in a divorce action, so far as it affects the status of the parties, does not become effective until the expiration of one year from the date of entry). A final judgment of divorce, therefore, entered in 1915, based upon an interlocutory decree properly entered in 1909, left the parties free to marry again without waiting a year. *Kitzman v. Werner*, 308

14. Under sec. 2374, Stats. 1915, there is no absolute severance of the marriage relation until the expiration of one year from the entry of a judgment of divorce, and under sub. 2, sec. 2330, if either party marries again during that year such marriage is null and void, even though contracted in another state. *White v. White*, 615

DOWER.

See TRUSTS AND TRUSTEES, 2.

1. The Statute of Westminster 2 (13 Edward I. ch. 34), under which a husband could bar his wife's dower in case she voluntarily left him to live in adultery with another and he did not willingly reconcile her, is not in force in Wisconsin. An adequate and broader remedy having been provided by our statutes which make a single act of adultery on the wife's part a cause for divorce from the bonds of matrimony and make such a divorce a bar to dower, it must be deemed that such legislation is exclusive and "suspended" the ancient statute, within the meaning of sec. 13, art. XIV, Const. *Davis v. Estate of Davis*, 328

2. The fact that a husband, for religious or other reasons, does not wish to avail himself of the remedy given him by law and divorce his wife, cannot give present efficacy to the superseded remedy. *Ibid.*

DRAINS.

Town drains: Notices: Assessment of damages.

1. The notice provided for in sec. 1360, Stats. 1913, need be served personally only upon the owners of the lands through which the proposed drain will pass, the posting of such notice as prescribed in said section being legal notice to others of the proceeding to lay out the drain. *Pederson v. Chipman,* 348
2. One whose land will be injured by a proposed town drain must proceed diligently to have his damages determined and included in the expense of construction which is to be assessed against the lands benefited. *Ibid.*
3. Under sec. 1367*h*, Stats., providing that the circuit court shall require performance when any officer or body fails or refuses to perform an act required "within the time specified in sections 1359 to 1367*c*," the "time specified" must lie somewhere between the filing of the petition and the assessments for construction. *Ibid.*
4. Where a town drain was laid out in 1913 and constructed in 1914 after an award of damages duly made, the owners of lands beyond and below the end of the ditch, upon which water from the ditch flowed in 1916, cannot by a proceeding commenced in 1917 under sec. 1367*h*, Stats., compel the supervisors to award damages for such flowage, although to one of such owners no damages had ever been awarded and the others claim that the damages which were awarded to them were inadequate. *Ibid.*
5. If aggrieved by the award of damages made prior to the construction of the drain, such landowners should have appealed to the county court as provided in sec. 1367, Stats. *Ibid.*

DUE PROCESS OF LAW. See JUVENILE COURTS, 2.

EJECTMENT. See DEEDS, 4, 5.

ELECTION.

Between remedies. See CONTRACTS, 7. VENDOR AND PURCHASER, 4, 5.

By widow not to take under will. See WILLS, 6.

ELECTIONS.

Qualifications of voters; Residence: Habitation.

1. Evidence that single men, residents of the state, had for more than ten days prior to the election in question been actually employed as guards at the only manufacturing plant in a town, lodging, taking their meals, and keeping their clothes at the barracks provided for them inside of the grounds of said plant, and that at the time of the election each of them intended to continue such employment and remain in the town indefinitely or permanently, considered that town as his home, had no other home and no intention of removing from the town, had not come into the town for any temporary purpose, and was self-supporting, is *held* to sustain a finding by the trial court that they were residents of the town, within the meaning of sec. 6.51, Stats., and legal voters at said election. *State ex rel. Catlin v. Galligan,* 487

2. The barracks in which said guards lived, having all the equipment and conveniences of the ordinary home, were a proper place for a habitation, within the meaning of sec. 6.51, Stats. *Ibid.*

Action to try title to office: Burden of proof. See QUO WARRANTO.

ELEVATORS. See NEGLIGENCE, 4.

EMINENT DOMAIN.

Compensation for property taken. See MILLS AND MILLDAMS. MUNICIPAL CORPORATIONS, 8. RAILROADS, 10–12.

Sec. 13, art. I, Const., requiring compensation to be made for property taken for public use, does not, when a part only of a street is vacated, require compensation for a depreciation in lots not adjacent to such part by reason of the resulting circuity of approach or reduction of travel and traffic on the street. *Johnston v. Lonstorf*, 128 Wis. 17, overruled on this point; *Tilly v. Mitchell & Lewis Co.* 121 Wis. 1, distinguished. *Chicago & N. W. R. Co. v. Railroad Comm.* 185

EMPLOYERS' LIABILITY. See INSURANCE, 7. MASTER AND SERVANT, 2–13. WORKMEN'S COMPENSATION.

ENTICEMENT of child. See INFANTS.

ENTIRE CONTRACT. See CONTRACTS, 1.

EPILEPTICS: Marriage: Validity. See MARRIAGE, 1, 3.

EQUAL PROTECTION OF THE LAWS. See CONSTITUTIONAL LAW, 6, 7.

EQUITY. See CONTRACTS, 16. CONTRIBUTION. COURTS, 1. DEEDS, 4. EXECUTION, 6. FRAUD, 4–6. INSURANCE, 1, 3, 7. LANDLORD AND TENANT, 1. MORTGAGES. PRINCIPAL AND SURETY. TRIAL, 1. TRUSTS. UNLAWFUL DETAINER. VENDOR AND PURCHASER, 4.

ESTATES.
In land. See PERPETUITIES. VENDOR AND PURCHASER, 3. WILLS, 5.
Of decedents. See EXECUTORS. WILLS.

ESTOPPEL. See CARRIERS, 10. EXECUTORS, 1.

EVICTION. See LANDLORD AND TENANT, 3–5.

EVIDENCE.

Judicial notice. See MARRIAGE, 3.

Presumptions. See WILLS, 1.

Burden of proof. See INSTRUCTIONS TO JURY, 3. QUO WARRANTO. RAILROADS, 4. WORKMEN'S COMPENSATION, 11.

Relevancy, materiality, and competency. See BASTARDY. CRIMINAL LAW, 1. DEEDS, 2, 3. WITNESSES, 3. WORKMEN'S COMPENSATION, 17.

1. In an action by an employer against a father who, by false representations as to the age of his son, had induced the plaintiff to employ the son in violation of law, a question on plaintiff's cross-examination as to whether he knowingly had, at the time he hired defendant's son, other boys under sixteen years old working in his factory, was properly excluded, there being no offer to show that such boys were employed in violation of law. *Stryk v. Mnichowicz,* 265

2. Testimony of witnesses in such case that they had worked for plaintiff on prohibited machinery while they were under sixteen years of age was properly excluded, there being no offer to show that plaintiff either knew or ought to have known that they were under the required age. *Ibid.*

3. In an action involving only the question of the value of defendants' services as attorneys for the vendors in a land contract, it was not error to exclude a letter from the vendee's agent purporting to show that he was ready to pay the amount due, where such letter had not been brought to the attention of the defendants. *Hollingworth v. Shannon,* 224

4. In an action for the loss to his mother resulting from a brakeman's death, a sister of the deceased was properly permitted to testify that he had expressed his intention and purpose of remaining single and not marrying. *Sullivan v. M., St. P. & S. S. M. R. Co.* 518

5. In an action to recover damages for breach of a contract to transfer to plaintiff certain stock in the C. mining company, it appeared that a very large part of the consideration for such contract was an agreement by plaintiff to stop the prosecution of another suit, affecting the title to certain mining claims, which plaintiff had brought in Utah against other companies which were predecessors in title of the C. mining company; that defendant was a stockholder in said other companies as well as in the C. mining company; and that plaintiff did in fact prosecute the Utah suit to judgment, the result being a determination that he had no interest in said mining claims. *Held,* that the record of the Utah suit, offered in evidence by defendant, should have been received. *Elmergreen v. Kern,* 560

Admissions. See CONTRACTS, 10.

Hearsay. See WORKMEN'S COMPENSATION, 19.

Documentary: Books of account. See BANKS AND BANKING, 5.

Parol evidence affecting writings. See BROKERS, 2. SALES, 1. TRUSTS, 3. VENDOR AND PURCHASER, 2.

6. The true consideration for a conveyance of real estate may always be inquired into and established by parol, although upon its face the conveyance be absolute. *Glander v. Glander,* 12

Opinion evidence: Expert testimony. See CRIMINAL LAW, 1.

7. A party has the right to the opinion of an expert witness on the facts of the case as he claims them to be, and may propound hypothetical questions assuming as proved all facts which the evidence tends to prove. *Sullivan v. M., St. P. & S. S. M. R. Co.* 518

8. Notwithstanding the general rule that an expert witness should not be permitted to give his opinion upon the ultimate fact to be found by the jury, when such ultimate fact is a scientific question, as whether or not the death of a person was the result of a fall which he sustained, the opinion of an expert may be given without invading the province of the jury. *Ibid.*

Weight and sufficiency. See BROKERS, 2, 3. DEEDS, 1, 2. ELECTIONS, 1. FRAUD, 3–5. GIFTS. INSTRUCTIONS TO JURY, 3. INSURANCE, 8. MASTER AND SERVANT, 2, 12, 13. RAILROADS, 16. RAPE. SALES, 2. WILLS, 1, 3. WITNESSES, 1. WORKMEN'S COMPENSATION, 18.

Errors in admitting evidence. See APPEAL, 6, 11.

EXCEPTIONS, BILL OF. See APPEAL, 8.
EXCESSIVE DAMAGES. See DAMAGES, 2.
EXCHANGE OF PROPERTY. See REPLEVIN.

EXECUTION.

Redemption: Mistake as to amount: Payment: When sheriff bound by statement: Loss of land: Remedies.

1. Where, within a year after the sale of land on execution, the owner informs the sheriff that he wishes to redeem and the sheriff undertakes to compute and to state the amount necessary to be paid, he is bound by such statement, and the payment or tender by the owner of the amount so stated constitutes a redemption, even though said amount was less than the proper amount. *Williams v. Thrall,* 410

[2. Whether or not the sheriff is bound in such a case to furnish the owner with a statement of the amount necessary to redeem, is not decided.] *Ibid.*

3. Findings in a special verdict to the effect that a sheriff made the clerk of court his agent to receive money in redemption of land from an execution sale, and that the money was paid to said clerk, are not inconsistent, the latter finding meaning that the manual delivery of the money was to the clerk, but to him as agent of and for the sheriff. *Ibid.*

4. Refusal of a sheriff to accept money tendered in redemption of land sold on execution does not create a liability against him and his bondsmen unless the owner thereby lost title to the land or some part of it; and there was no such loss of title as against the purchaser at the execution sale if such tender in fact constituted a redemption. *Ibid.*

5. If in such case there was in fact a redemption and the title to any portion of the land has been lost by sales to innocent purchasers, the owner has a claim against the sheriff and his bondsmen for the damages resulting from such loss. *Ibid.*

6. For a proper determination of the facts in such a case there should be an action in equity to quiet title and, incidentally, for damages against the sheriff in case the title has been lost; and in such action, besides the sheriff and his bondsmen, the purchaser at the execution sale and all other persons in possession or claiming any interest in the land should be made parties. Where an action has been brought against the sheriff and his bondsmen only, the court may order the pleadings to be amended and new parties brought in, as stated. *Ibid.*

7. The action in such case would not be barred until the expiration of ten years, under sub. 4, sec. 4221, Stats. *Ibid.*

EXECUTION of will. See WILLS, 1.

EXECUTORS AND ADMINISTRATORS.

Collection and management of estate: Rights of action. See BANKS AND BANKING, 2. INSURANCE, 13. PARTNERSHIP, 14.

Same: Title to promissory notes. See GIFTS.

Conversion of assets by executors. See COURTS, 2, 3.

Claims against decedents: Estoppel.

1. During the last eleven years of his life a childless widower had made his home with his deceased wife's niece and her husband. There had been a considerable number of money transactions between them, and he had conveyed to the husband thirty-four acres of land with buildings for an expressed consideration of "one dollar and other good and valuable considerations." He also had done light work about the house and at times had purchased groceries for use in the home. While, as the niece knew, he was having his will drawn he called her into the room and asked her how much he owed her for board and care, to which she replied "Nothing; you have paid us over and over again." He then completed his will, making to her a bequest of $200. *Held*, that she was estopped to make any claim against his estate for his board and care. *Davis v. Estate of Smock*, 1

Same: Claims payable at a future day: Filing: Contingent claims.

2. A claim based on the written agreement of a decedent to pay a certain sum within sixty days after the death of his mother is one which will be barred under sec. 3844, Stats., unless presented within the time limited for filing claims against the estate of such decedent, the only uncertainty being as to the time when the obligation will mature. *Estate of Kleinschmidt*, 450
3. By taking into consideration the mother's expectancy of life, "the then present value" of such a claim can be determined under secs. 3843, 3871*m*, Stats., with the same certainty as in the case of any other demand "payable at a future day." *Ibid.*
4. Such a claim is not one which may be presented under sec. 3860, Stats., which provides that if a claim shall "accrue or become absolute" after the time limited for creditors to present their claims, it may be presented and proved at any time within one year after it shall accrue or become absolute. *Ibid.*
5. Nor is such a claim a contingent claim under secs. 3858, 3859, Stats., it being certain to become an actual liability, although the exact time when it will become due is uncertain. *Ibid.*

Same: Partnership debt. See PARTNERSHIP, 15.

Stipulation affecting creditors' rights. See PARTNERSHIP, 10.

EXEMPLARY Damages. See DAMAGES, 1. TELEGRAPHS, 3, 4.

EXEMPTIONS.
From payment of license fees. See CONSTITUTIONAL LAW, 7.
From taxation. See TAXATION, 1, 2.

EXPERT TESTIMONY. See CRIMINAL LAW, 1. EVIDENCE, 7, 8.

EXTENSION of railroad. See RAILROADS, 1–3.

FALSE REPRESENTATIONS. See FRAUD. INSURANCE, 8. TRUSTS, 4.

FEDERAL AND STATE COURTS: Jurisdiction. See CARRIERS, 11.

FEDERAL AND STATE STATUTES. See MASTER AND SERVANT, 3–5, 10, 11.

FEES: Exemption from payment. See CONSTITUTIONAL LAW, 7.

FELLOW-SERVANTS. See MASTER AND SERVANT, 11.

FINDINGS OF FACT.
Finding or conclusion? See WATERS, 4.
Matters omitted from special verdict: Presumption. See REPLEVIN, 2.

FIRE INSURANCE. See INSURANCE, 1–6.

FLOWAGE OF LAND. See DRAINS, 4, 5. MILLS AND MILLDAMS. MUNICIPAL CORPORATIONS, 15.

FORECLOSURE.
Of mortgages. See COSTS, 2. INSURANCE, 3. MORTGAGES.
Of land contract. See VENDOR AND PURCHASER, 4, 5.

FOREIGN CORPORATIONS. See CORPORATIONS.

FOREIGN STATUTES. See MARRIAGE, 1–3.

FORFEITURE of wages. See MASTER AND SERVANT, 1.

FRAUD.

See BANKS AND BANKING, 1–3. CONTRACTS, 16. EVIDENCE, 1, 2. INSURANCE, 8. LANDLORD AND TENANT, 1. MASTER AND SERVANT, 12, 13. REPLEVIN. SALES, 1.

False representations inducing illegal act: Employment of minor.

1. One who is induced by false representations to do an act which, in consequence of such representations and without negligence on his part, he believes to be neither illegal nor immoral, and which would not be illegal or immoral if the representations were true, but which is in fact a criminal offense, may recover from the maker of the representations any damages sustained by him proximately resulting from the act. *Stryk v. Mnichowicz,* 265

2. The rule that a minor, suffering an injury while engaged in an employment which the law forbids him to be engaged in on account of his age, cannot be barred of his recovery nor subjected to an action or counterclaim for damages because he misrepresented his age when he was employed, does not apply to the father or other third person upon the faith of whose false representations the minor was employed. *Ibid.*

Actions: Degree of proof.

3. Recovery may be had in cases of fraud where the fraud is established by a clear and satisfactory preponderance of the evidence. *De Groot v. Veldboom,* 107

Fraud in sale: Mortgage: Sufficiency of evidence: Inadequacy of consideration.

4. In an action by K. and wife to set aside on the ground of fraud a mortgage given by the wife on her separate property to secure a part of the purchase price which K. had agreed to pay for the equipment used by defendant as a distributing agent for an oil company and for the "good will" of the business when the defendant procured the appointment of K. as his successor in the agency, findings by the trial court negativing fraud on the part of the defendant are *held* to be supported by the evidence, which shows, among other things, that K. knew that the agent was subject to discharge at any time by the company and that there was no "good will" or "business" which would exist after such discharge; that plaintiffs fully understood the contract with defendant; and that no claim of fraud was made until, a few months after his appointment to the agency, K. was discharged through his own fault. *Krause v. Reichel,* 360

5. The fact that in procuring the appointment of K. the defendant concealed his interest in the matter from the manager of the oil company, who testified that if he had known of such interest

he would not have accepted defendant's recommendation, does not affect plaintiffs' rights, they having obtained the property and the agency contracted for, and the agency having been lost wholly through the fault of the plaintiff K. *Ibid.*

6. Even if the equipment and the procurement of the agency, taken together, were an inadequate consideration for the payment to be made by plaintiffs, that fact alone is not a fatal defect or cause for rescission where, as in this case, the inadequacy is not so gross as, of itself, to prove fraud. *Ibid.*

FRAUDS, STATUTE OF. See LANDLORD AND TENANT, 1. VENDOR AND PURCHASER, 1, 2.

GIFTS.

See INSURANCE, 6.

A finding by the circuit court to the effect that decedent had, prior to his death, made a gift to his son (since deceased) of certain notes executed by the son to his father, is *held* to be sustained by the evidence, which, among other things, shows that no confidential relation other than that of father and son existed between them. *Estate of Gilbert,* 291

GOOD WILL. See FRAUD, 4.

GOVERNMENT CONTRACTS. See CONTRACTS, 2–15.

GRADE CROSSINGS. See RAILROADS, 9–12.

GUARDIAN AND WARD.

See PARENT AND CHILD, 3, 4.

An order made by a county judge committing children to the state public school at Sparta is not an order appointing a guardian or reviewable as such by the circuit court. The state board of control becomes the guardian of children so committed, not by appointment, but by force of the statute (sec. 573*d*). *Guardianship of Knoll,* 461

HABITUAL CRIMINALS. See CRIMINAL LAW, 4.

HARMLESS ERRORS. See APPEAL, 11. BASTARDY. CRIMINAL LAW, 2. INSURANCE, 2. WORKMEN'S COMPENSATION, 19.

HEALTH. See CONSTITUTIONAL LAW.

HEARSAY EVIDENCE. See WORKMEN'S COMPENSATION, 19.

HIGHWAYS.

Bridges. See BRIDGES.

Grade crossings. See RAILROADS, 9–12.

Injuries from defects. See TRIAL, 2.

1. One who, in broad daylight, knowingly drives his automobile over a highway which is at the time in a slippery and dangerous condition by reason of a recent application of tar and oil, is guilty of contributory negligence as a matter of law and cannot recover for injuries sustained by reason of such slippery condition. *Raymond v. Sauk County,* 125

2. The fact that the county highway commissioner did not, as he might under sub. 7, sec. 1317*m*—6, Stats., suspend travel on such highway, or that no warning, by putting up signs or otherwise, was given of its defective condition, cannot affect the rights of a

traveler who from the visible condition of the road itself had notice of the danger. *Ibid.*

3. A highway which crossed a ravine thirty feet wide upon a fill or embankment about four feet deep at the deepest place and having a hard, smooth surface about twelve feet wide at the narrowest point, and not wide enough at any point for two automobiles to pass each other safely, was not defective as a matter of law, where the highway was straight at that place so that cars coming in either direction could be seen at a considerable distance. *Miner v. Rolling,* 213

4. An instruction to the jury under which it was left to them to consider, in passing upon the sufficiency of such highway, the depth of the fill, its precipitous sides, the absence of a barrier, the presence of growing brush, and all the other facts and circumstances shown by the evidence, is *held* to have been correct and adequate. *Ibid.*

5. In an action against a town for injuries alleged to have been caused by an automobile running off from a narrow embankment upon which a highway crossed a ravine, there being evidence which would have warranted the jury in finding that the car did not go over the embankment but down the side of the ravine, the court properly charged the jury upon the subject of a traveler voluntarily or without cause leaving the traveled track. *Ibid.*

6. An instruction in such case that if the town prepares a traveled track reasonably safe and wide, and sufficient for travel, it is not liable for accidents occurring thereon, was not improper on the ground that it informed the jury of the effect of their answer, in the special verdict, to the question as to the sufficiency of the highway. *Ibid.*

HOMESTEAD. See WILLS, 5.

HOMICIDE.

Manslaughter: Degrees: Assault and battery.

1. Under our statutes there is no lower degree of homicide than manslaughter in the fourth degree; and on a trial for any degree of homicide the defendant cannot be convicted of assault and battery. *Roohana v. State,* 500

2. Where the death of a person was caused by a blow struck in an unlawful assault upon him, the assailant is guilty, at least, of manslaughter. *Ibid.*

Same: Reasonable doubt of guilt: Duty to set aside verdict.

3. A conviction of manslaughter in the fourth degree, of a man charged with murder of his wife, is reversed and a new trial granted on the ground that there was plainly, on the evidence, a reasonable doubt as to his guilt. *Kuhl v. State,* 495

4. Where, upon the evidence in such case, the trial judge expected an acquittal, thought it was as likely that the wife's death resulted from her being knocked down twice by a bull as that it was caused by a blow or blows from the husband, and, if he had been upon the jury, "could not conscientiously have found the defendant guilty," it was his duty to set aside the verdict. *Ibid.*

HOSPITALS.

1. Upon the evidence in this case the question whether any injury to plaintiff's health was proximately caused by negligence of the attendants in the defendant hospital, or whether the injuries complained of are attributable to ailments with which plaintiff had been afflicted a long time before she entered the hospital as a patient, is *held* to have been one for the jury. *Zawacki v. Good Samaritan Hospital,* 422
2. In an action against a physician and a hospital for injury to the health of a patient, where the jury found that plaintiff was injured by the treatment given her by each defendant and that negligence of each defendant was a proximate cause of the injury, and assessed her damages, but after verdict the trial court correctly held that the physician was not negligent, a new trial was necessary, it being manifest that a part of the damages awarded were for the injury which the jury found was produced by the physician's treatment. *Ibid.*

HUSBAND AND WIFE.

See DIVORCE. DOWER. MARRIAGE. TRUSTS, 2.

Wife's separate business and property.

[1. Whether, where a farm is owned in part by the wife and in part by the husband and is operated by both together, an agreement between them that all charges for board and care of a third person shall be considered her individual earnings and separate business is a valid agreement, not decided.] *Davis v. Estate of Smock,* 1
2. A married woman may give a valid mortgage on her own property in payment of or as security for her husband's debt. *Krause v. Reichel,* 360

HYPOTHETICAL QUESTIONS. See EVIDENCE, 7, 8.

IMMUNITY from suit. See STATES.

INDEMNITY CONTRACT. See INSURANCE, 7.

INDUSTRIAL COMMISSION. See WORKMEN'S COMPENSATION, 12–19.

INFANTS.

See EVIDENCE, 1, 2. FRAUD, 2. GUARDIAN AND WARD. JUVENILE COURTS. PARENT AND CHILD.

Enticement.

Sec. 4587*b*, Stats., providing for punishment of "any person who shall entice or seek to entice any child away from the person or place to which it has been committed for safe-keeping pursuant to law, or who shall interfere with the care, custody, control, personal liberty or education of any such child," does not refer to children living at home with their parents, the word "committed" meaning a legal commitment. *Meyers v. State,* 278

INHERITANCE TAX. See TAXATION, 3.

INJUNCTION. See COURTS, 1.

INSANE PERSONS. See DEEDS, 1–3. MARRIAGE, 3.

INSTRUCTIONS TO JURY.

See HIGHWAYS, 4–6. MASTER AND SERVANT, 4, 12. RECEIVING STOLEN PROPERTY.

In connection with special verdict.

1. The giving to the jury of general rules of law appropriate to the particular question of the special verdict in connection with which such rules are given, is not error. *Miner v. Rolling,* 213

2. If elucidation of a question in a special verdict is deemed necessary by counsel, they should submit a request therefor. *Sullivan v. M., St. P. & S. S. M. R. Co.* 518

Same: Informing jury of the effect of answer. See HIGHWAYS, 6.

Burden of proof: Reasonable certainty.

3. Where the charge to the jury states that the burden of proof is upon the plaintiff and that it is incumbent upon him to establish the fact, as he claims it to be, to the satisfaction of the jury by a preponderance of the credible evidence in the case, the court need not add that the jury should be satisfied "to a reasonable certainty," that phrase being mere surplusage when used in such connection. *Sullivan v. M., St. P. & S. S. M. R. Co.* 518

INSURANCE.

Fire: Mortgaged property: Insurable interest: Mistake: Impleading insurance companies in foreclosure suit. See COSTS, 2. MORTGAGES.

1. A mortgagor who has sold the premises but remains liable for the mortgage debt has an insurable interest and, to protect himself, may take out a valid insurance policy in the name of the owner, with loss, if any, payable to the mortgagee, where all the facts are known to the insurer; and the mortgagee may enforce such policy in case of a loss. *Lumbermen's Nat. Bank v. Corrigan,* 82

2. Where the trial court found that both parties to an insurance policy intended that the loss should be payable to a mortgagee, but that by a mutual mistake the policy did not express such intent, a judgment based on the theory of a reformation of the policy should not be disturbed merely because such reformation was not formally adjudged. *Ibid.*

3. Where the purchaser of mortgaged premises, who had assumed the mortgage, procured insurance in his own name and, after a loss, assigned all moneys to become due on the policy to the mortgagor to be applied on the mortgage, providing, however, that any excess should be paid to said purchaser, and there was no excess, such assignment, whether it was in trust or otherwise, and the rights of all parties under the policy could properly be enforced in an action to foreclose the mortgage, in which all parties interested were before the court. *Ibid.*

Same: Construction of policy: "Additions."

4. The words "additions thereto," when used in a fire insurance policy with reference to a building, ordinarily refer to some

structure physically attached to or connected with the building itself. *Agnew v. Sun Ins. Office,* 456

5. Where several detached farm buildings were covered by two policies, each building "and additions thereto" being insured separately for a specific amount, a wagon shed with chicken coop attached which was located twenty-four feet from the nearest of the buildings specified in one policy and fifty-eight feet from the nearest building specified in the other, and was not in any way attached to or connected with any other building, was not an addition to any of the insured buildings within the meaning of the policies. *Ibid.*

Same: Forfeiture: Procuring other insurance.

6. After a father had, in February, insured his dwelling in the defendant company, his son gave him a policy in another company which he had procured in the previous December as a Christmas present. The father accepted the policy from the son, retained it, and, after the dwelling was burned, was paid by that company its share of the loss. *Held* that, whether the act of the son was an agency transaction, the making of a contract by one for the benefit of another, or a gift, the father had, by ratification or acceptance, "procured" further insurance in violation of a condition in defendant's policy. *Gnat v. Westchester F. Ins. Co.* 274

Employers' liability: Indemnity contract: Subrogation. See WORKMEN'S COMPENSATION, 20.

7. A policy insuring an employer against loss arising out of injuries to his employees is in the nature of accident insurance and unless it is expressly made an indemnity contract the insurer is not subrogated to the rights of the insured against third persons whose negligence caused an injury. *Marshall-Jackson Co. v. Jeffery,* 63

Life: Mutual benefit associations: Fraud in application.

8. In an action upon a policy or certificate of life insurance issued by a mutual benefit association, the evidence is *held* to show conclusively, contrary to a finding by the jury, that the assured did not fully and truthfully answer the question, in her application, as to when and for what she had sought the advice of a physician or surgeon during the three years prior to making such application. *Rowell v. Women's Catholic Order of Foresters,* 240

Same: Vested rights of beneficiary: Assignment of certificate: Competency of witness.

9. The beneficiary named in a certificate issued to a member of a fraternal benefit society does not acquire absolute and indefeasible rights until the death of the member. *Hayden v. Women's Catholic Order of Foresters,* 437

10. Where a member of a benefit society, holding an endowment certificate upon which her son had been paying the dues and assessments, made an oral agreement with him by which she was to make him her beneficiary under such certificate and he was to continue to make such payments and was also to give her a home and care for her during her remaining years, and pursuant thereto she changed her certificate for a new one in which the son was named as beneficiary, such attempted assignment or pledge was void under provisions in the constitu-

tion of the society, made a part of its contract with the member, that "an endowment certificate cannot be made payable to a creditor, nor held wholly or in part, nor assigned, to secure any debt which may be owing by the member," and that "any assignment of an endowment certificate . . . shall be void;" and the son acquired no rights or interest in or to the certificate and its proceeds. *Ibid.*

[11. Whether, after the mother's death, the son was a competent witness to testify to the oral agreement with her, under sec. 4069, Stats., is not decided.] *Ibid.*

Same: Recovery of assessments paid after death of member.

12. A member of the defendant benefit society disappeared in 1901 and was not thereafter heard from, and it is established that he died in 1901. In the mistaken belief that he was still living his mother, the beneficiary, continued to pay the assessments on his benefit certificate until her death in 1904, and thereafter such assessments were paid by his heirs until 1915, when this action was brought by one of said heirs (who was also assignee of the other heir) to recover the assessments so paid by them. It appearing that defendant's officers, with full knowledge of the facts as to the member's disappearance, had advised said continued payment of the assessments, and that both parties considered and treated the benefit certificate as valid up to November 19, 1914, when defendant rejected a demand for payment thereon, it is *held* that the assessments so paid by the heirs may be recovered. *White v. Brotherhood L. F. & E.* 323

13. Neither the estate of the deceased member nor that of the beneficiary is interested in the claim for recovery of the assessments so paid by the member's heirs. *Ibid.*

14. The certificate having been kept alive and treated as valid by both parties until November 19, 1914, no cause of action for recovery on the certificate or of the assessments paid after the death of the insured accrued until the rejection by defendant of the demand made on that date; and the action is therefore not barred by the statutes of limitation. *Ibid.*

15. Interest on the amount of the assessments for which recovery is had in such action should be allowed only from November 19, 1914. *Ibid.*

INTENT to procure miscarriage. See PHYSICIANS AND SURGEONS, 1, 2.

INTEREST. See CONTRACTS, 14, 15. INSURANCE, 15. PARTNERSHIP, 4, 7, 8. SALES, 2.

INTERPLEADER. See CARRIERS, 1.

INTERSTATE COMMERCE. See CARRIERS, 11. MASTER AND SERVANT, 3–11.

JITNEYS. See MASTER AND SERVANT, 15.

JOINDER.
Of causes of action: Connected claims. See EXECUTION, 6. INSURANCE, 3. MORTGAGES. MUNICIPAL CORPORATIONS, 6.
Of parties. See EXECUTION, 6. INSURANCE, 3. MORTGAGES. MUNICIPAL CORPORATIONS, 6. PARTIES.

JOINT OBLIGORS. See JUDGMENT, 1. PARTNERSHIP, 11–13, 15.

JOINT TORTFEASORS. See CONTRIBUTION. JUDGMENT, 2–5. PARTIES.

JUDGES: Administrative duties. See JUVENILE COURTS, 4.

JUDGMENT.

Form in particular actions. See DIVORCE, 11, 12. REPLEVIN, 4. UNLAWFUL DETAINER, 2.

Incomplete judgment. See INSURANCE, 2. JUDGMENT, 2.

Perfecting judgment: Right to costs. See COSTS, 1.

Interlocutory or conditional judgment. See DIVORCE, 1–5, 12–14.

Against partners: Some not served.

1. Where plaintiff's cause of action was based on breaches by copartners of contracts signed by two of them, and judgment was demanded against all the copartners upon their joint partnership liability, such cause of action, if established, would have entitled the plaintiff, although the summons was served upon a part only of the defendants, to a judgment under sec. 2884, Stats., against all of them which might be enforced against the joint property of all and the separate property of the defendants served. *Progress Blue Ribbon Farms v. George,* 228.

Vacating judgment. See DIVORCE, 1, 2, 4.

Relief against judgment: Mistake, etc. See TRIAL, 3.

Construction: Operation: Incomplete judgment. See INSURANCE, 2.

2. In an action against two persons whose independent but concurring negligent acts are alleged to have caused an injury, where a verdict was directed in favor of one defendant and judgment rendered against the other, such judgment must be construed as one in favor of said first defendant although he is not mentioned therein—it being presumed that the judgment, as it should, disposed of all the issues. *Bakula v. Schwab,* 546

Conclusiveness: As between joint tortfeasors: Right of appeal. See CONTRIBUTION, 3.

3. In an action against independent tortfeasors whose concurring wrongful acts are alleged to have caused an injury, a judgment in favor of one of the defendants but in plaintiff's favor against the other is not *res adjudicata,* even upon the question of the liability of the defendants to the plaintiff, in a subsequent action for contribution between the defendants. Such a case is not within the reason of the rule which, in an action against defendants whose liabilities are founded upon contract, makes the judgment *res adjudicata* of the amount and nature of the indebtedness of all defendants to the plaintiff. *Bakula v. Schwab,* 546

4. In order to be *res adjudicata* in a subsequent suit, a judgment must have been rendered in an action in which the parties to the subsequent suit were adverse parties, *i. e.* they must have been arrayed on opposite sides of an issue proffered by one and controverted by the other. The defendants in the tort action above mentioned were not such adverse parties. *Ibid.*

5. So, too, an element essential to constitute *res adjudicata* is a right of appeal from the judgment; but in the case stated the defendant held liable cannot have the right to appeal and secure a reversal of the judgment on the ground that it was error to release the other defendant, for that would unjustly subject the plaintiff to the unnecessary burden, expense, and hardship of another trial merely because of a possible future controversy between the defendants upon the subject of contribution. *Ibid.*

Same: Effect in divorce action. See DIVORCE.

JUDICIAL NOTICE. See MARRIAGE, 3.

JURISDICTION. See CARRIERS, 6–8. COURTS. JUVENILE COURTS. PARENT AND CHILD, 2–5. PROCESS.

JURY.
Right to jury trial. See JUVENILE COURTS, 1. TRIAL, 1.
Questions for jury. See TRIAL.
Instructions to jury. See INSTRUCTIONS TO JURY.

JUSTICES' COURTS. See UNLAWFUL DETAINER, 1.

JUVENILE COURTS.

1. Proceedings under the juvenile court law are in no sense criminal proceedings, nor is the result in any case a conviction or punishment for crime. They are simply investigations by the state into conditions which if unchecked may lead to the making of its children into criminals instead of law-abiding citizens. The constitutional guaranty of trial by jury is therefore inapplicable. *State v. Scholl,* 504

2. The constitutional requirement of "due process of law" does not prevent in such proceedings the use of investigation and unsworn testimony in ascertaining the essential facts. [It may be advisable, however, in a case where it seems best to take the child permanently from its parents and consign it to the care of an institution, that sworn testimony be taken and the essential facts be thus proven before the final order is made, in order to avoid any question as to the validity of such order.] *Ibid.*

3. The so-called "juvenile court" is not in fact a separate and independent court, but is rather a jurisdiction which is to be exercised in his court for a stated period by a judge selected by and from the judges of the courts of record in the county. *Ibid.*

4. The power thus given to the judges of a county to designate one of their number to exercise such jurisdiction is an administrative duty which may properly be imposed upon them. *Ibid.*

LABORERS: Payment. See MUNICIPAL CORPORATIONS, 3–6. PRINCIPAL AND SURETY, 1, 7.

LACHES. See CARRIERS, 9.

LAND CONTRACT. See ATTORNEY AND CLIENT. EVIDENCE, 3. PLEADING, 1. VENDOR AND PURCHASER.

LANDLORD AND TENANT.

See UNLAWFUL DETAINER.

Validity of lease: Part performance: Specific enforcement.

1. Although an oral agreement for the lease of a farm for three years was void under sec. 2304, Stats., yet under sec. 2305 specific performance thereof may be compelled in case of part performance. Thus, if it was definitely and certainly agreed that the lessee should do certain work towards improving the farm and should receive pay therefor, and pursuant thereto he entered into possession and performed to a substantial extent, and if the repudiation of the agreement by the lessor would amount to a fraud, the agreement may be declared valid and be enforced so far as necessary to protect the lessee's substantial rights. *Booher v. Slathar,* 196

Breach of agreement to heat apartment: Eviction.

2. Under a lease in which the landlord agrees to furnish heat in a city apartment, the tenant is entitled to sufficient heat to make the rooms generally comfortable to dwell in for ordinary persons, due regard being had to the kind of use for which each room is intended, and excluding lapses due to sudden and severe changes in temperature, to occasional inattention by the janitor, or to the necessity of making repairs to the heating plant, or to other unforeseen or excusable causes. *Harper v. McMahon,* 388
3. To constitute an eviction in such a case by reason of lack of heat the apartment need not be continuously cold. *Ibid.*
4. A tenant is entitled to the use of the entire premises rented by him, and the landlord cannot excuse a wrongful eviction from a portion thereof by the plea that the tenant can use the remainder. *Ibid.*
5. The evidence in this case is *held* to show a failure by the landlord to furnish adequate heat, constituting a breach of the lease and an eviction. *Ibid.*

LEASES. See LANDLORD AND TENANT.

LICENSE to practice medicine: Revocation. See PHYSICIANS AND SURGEONS, 3–5.

LICENSEE in railway station. See CARRIERS, 14.

LICENSING.
Of bakeries, etc. See CONSTITUTIONAL LAW, 4–7.
Of street railway cars. See MUNICIPAL CORPORATIONS, 9–11.

LIENS. See CONTRACTS, 12. PARTNERSHIP, 9, 10.

LIFE ESTATES. See WILLS, 5.

LIFE INSURANCE. See INSURANCE, 7–15.

LIMITATION OF ACTIONS.

See EXECUTION, 7. EXECUTORS, 2–5. INSURANCE, 14.

Promissory notes, from and after the execution of which the maker resided in Minnesota and the payee in Wisconsin, were governed by sec. 4231, Stats., and were not barred by the statute of limitations. *Estate of Gilbert,* 291

LIS PENDENS. See PROCESS, 2.

LIVE STOCK: Horses. See CARRIERS, 11–13.

LOGS AND LOGGING. See RAILROADS, 5.

MAILING of summons and complaint. See PROCESS.

MANSLAUGHTER. See HOMICIDE.

MARRIAGE.

Validity: Epileptics: Foreign statute: Public policy: Annulment.

1. Under sec. 7090, Gen. Stats. Minn. 1913, construed in connection with secs. 7095 and 7106, a marriage contracted by a person who is an epileptic is voidable only, and valid until dissolved by judicial decree. *Kitzman v. Werner,* 308
2. Although a marriage valid where contracted is valid everywhere, it has when properly challenged in a sister state no more immunity from attack than it would have had if the parties, instead of returning to such sister state, had gone on living in

the state to which they went to have the ceremony performed and the action had been instituted there. *Ibid.*

3. The public policy of Minnesota in prohibiting an epileptic from contracting a lawful marriage cannot be held to have been contrary to the public policy of this state in 1915, since in this state the marriage of insane persons and idiots was then prohibited and, although there is a distinction between epilepsy and insanity, the courts may take judicial notice that epilepsy is a serious mental disease and tends to weaken the power of the afflicted person and to injure his posterity; and especially since, by ch. 218, Laws 1917, the prohibition in this state against marriage has been extended so as to apply to epileptics. *Ibid.*

4. The state has the right to control and regulate by reasonable laws the marriage relationship of its citizens, and the wishes and desires or even immediate welfare of the individual must yield to the public welfare as determined by the public policy of the state. Hence, in an action properly involving the question of the validity of a marriage, the duty of the court in deciding that question is not altered by the expressed wishes of the parties. *Ibid.*

5. In an action under sec. 2352, Stats., to have a marriage declared valid, where the evidence showed that such marriage was voidable in the state where it was contracted and was not entitled to be recognized as valid under the public policy of this state, the court should have proceeded to annul and declare void such marriage, even though there was no counterclaim, and no desire on defendant's part, to have it annulled. *Ibid.*

Same: Marriage within year after judgment of divorce. See DIVORCE, 13, 14.

MARRIED WOMEN. See DIVORCE. HUSBAND AND WIFE.

MASTER AND SERVANT.

Unlawful employment of minor. See EVIDENCE, 1, 2. FRAUD, 2.

Breach of contract: Forfeiture of compensation.

1. A decision of the circuit court to the effect that a salesman whose employer's contract of agency with an automobile company was to expire at an early date did not, by soliciting for himself the appointment to such agency after that date, so breach his contract with his employer as to forfeit the amount due to him thereunder, is affirmed, this court being equally divided on the question. *Rathenberger v. Jacob,* 273

Master's liability for injuries to servant. See INSURANCE, 7. WORKMEN'S COMPENSATION.

Same: Injuries to railway employees: Liability under federal statute.

2. In an action for the death of a brakeman, although there was no eye-witness of the accident, the evidence is *held* to sustain findings by the jury that he was injured by a fall from defendant's freight car caused by the giving way of a defective handhold, and that his death was caused in whole or in part by the injuries so sustained. *Sullivan v. M., St. P. & S. S. M. R. Co.* 518

3. In an action for the death of a brakeman who was injured by reason of the giving way of a defective handhold on a freight car in interstate commerce, such action being governed by the

federal safety appliance and employers' liability acts, a question submitted in the special verdict as to whether his death was "caused in whole or in part by the injuries so sustained by him" is *held* preferable in form to a question proposed by defendant, "Was the death . . . caused by any injury suffered at the time . . . or was it caused by disease?" *Ibid.*

4. An instruction as to direct and remote cause, in connection with the question submitted as above stated, was not necessary and would have been out of place, proximate cause having nothing to do with liability under the federal acts. *Ibid.*

5. In leaving the railway yard when his work is done a railway employee is but discharging . duty of his employment and in a legal sense is at work as an employee of the company, provided he is so leaving by the proper and usual way or at least by a way known to and expressly or tacitly permitted by the employer. So *held* in an action for the death of an engineer, where the parties stipulated that if he was an employee of the defendant at the time of the accident the action wa governed by the federal liability act. *Ewig v. C., M. & St. P. R. Co.* 597

6. At the end of his run an engineer turned his engine over to the engine dispatcher and then rode upon it to the roundhouse yard in accordance with his custom, which was not disapproved by the railway company. Sometime later he was found, fatally injured, twisted around the brake-beam of the tender of another engine which had been backing through the yard at a place where employees frequently crossed the tracks in going to and from their work. Upon the evidence, which showed no active objection by the company to such use of the tracks, it is *held* to have been a jury question whether this was a usual and tacitly permitted way to enter and leave the roundhouse yard. *Ibid.*

7. The mere fact that the accident did not occur until about an hour after his engine reached the roundhouse yard would not justify a holding, as matter of law, that the deceased had stopped to visit or had turned aside from his duty, in view of other facts appearing from the evidence. *Ibid.*

8. Upon the evidence in the case it is *held* that the question whether there was actionable negligence in failing to keep a proper lookout on the backing engine was one for the jury. *Ibid.*

9. In this case the cause of the accident cannot be said to be necessarily mere conjecture, there being evidence tending to show that deceased was struck by the backing engine at a point where there was much travel to and fro and where he would very naturally be crossing the track in leaving the yard. *Ibid.*

10. Under the federal employers' liability act contributory negligence does not defeat the action, but simply requires that the proportion of such negligence be ascertained and the damages diminished to that extent. *Ibid.*

11. Assumption of risk still remains a defense under the federal act, but it does not include risk of unexpected negligent acts of coemployees. *Ibid.*

Same: Damages. See EVIDENCE, 4.

Same: Settlement: Release of claim.

12. In an action for personal injuries to an employee, where plaintiff claimed that a release executed by him had been procured by fraud, the court properly instructed the jury that "to impeach

a formal written instrument on the ground of fraud or mistake the proof must be clear and convincing beyond reasonable controversy." *Kenese v. Cudahy Bros. Co.* 378

13. In this case, the unsupported testimony of the plaintiff in denial of a settlement, that the release was not translated or explained to him, and that he believed and understood that the writing he signed was only a receipt for $50 for wages, being refuted by several witnesses whose credibility is corroborated by the facts and circumstances, the trial court properly changed a finding by the jury that the release was procured by fraud. *Ibid.*

Liability for injuries to third persons: Scope of employment.

14. A master is not liable for the tort of a servant unless the servant was acting within the scope of his employment when the tort was committed. *Youngquist v. L. J. Droese Co.* 458

15. A driver employed to operate a jitney bus which was licensed to run only on a certain route, and who had been specifically instructed not to vary from that route, was not acting within the scope of his employment when, without the employer's knowledge or consent, he departed from such route to take a passenger to his home; and the employer is not liable for an injury to such passenger caused by negligence of the driver while so off from the route. *Ibid.*

MATERIALMEN: Payment. See MUNICIPAL CORPORATIONS, 3–6. PRINCIPAL AND SURETY, 1, 4–6.

MAXIMS.
In pari delicto potior est conditio defendentis, 407.
Res judicata pro veritate accipitur, 33, 547, 552–555, 557.

MEASURE OF DAMAGES. See CONTRACTS, 14, 15. EMINENT DOMAIN. EVIDENCE, 4. MASTER AND SERVANT, 10. MILLS AND MILLDAMS. RAILROADS, 12. TELEGRAPHS, 1, 2.

MENTAL ANGUISH. See TELEGRAPHS, 2.

MENTAL CAPACITY. See DEEDS, 1–3. WITNESSES, 1.

MILLS AND MILLDAMS.

Compensation for injury to lands.

1. Under ch. 189, Laws 1907, granting power to build and maintain a dam across the Wisconsin river at Prairie du Sac, the licensees must make compensation for the injury to lands which are made permanently unfit for agricultural purposes by the backing up of the water, as well as for lands which are actually overflowed. *Wells v. Wis. River Power Co.* 345

2. The word "injure" in sec. 2, ch. 189, Laws 1907, and in sec. 1777*e*, Stats. 1898, should not be construed in its technical legal sense, as referring merely to an actionable wrong, but rather in the popular and usual sense, as applying to any damage inflicted. *Ibid.*

Prescriptive rights: Riparian rights: Reasonable use of water. See WATERS AND WATERCOURSES.

MILWAUKEE CIVIL COURT. See APPEAL, 9.

MINORS. See EVIDENCE, 1, 2. FRAUD, 2. GUARDIAN AND WARD. INFANTS. JUVENILE COURTS. PARENT AND CHILD.

MISCARRIAGE. See CRIMINAL LAW, 1, 2. PHYSICIANS AND SURGEONS.

MISTAKE. See INSURANCE, 2. MASTER AND SERVANT, 12.

MISTAKES, OMISSIONS, AMENDMENTS, ETC. See EXECUTION, 6. PARENT AND CHILD, 3. REPLEVIN, 2. TRIAL, 3. WATERS, 2. WORKMEN'S COMPENSATION, 13–16.

MODIFICATION of award. See WORKMEN'S COMPENSATION, 13–16.

MORTGAGES.

Trust not expressed in instrument: Parol evidence. See TRUSTS, 3, 4.

Mortgage by married woman. See HUSBAND AND WIFE, 2.

Transfer of mortgaged property: Assumption of mortgage: Fraud. See REPLEVIN.

Same: Insurable interest of mortgagor. See INSURANCE, 1.

Foreclosure by action. See COSTS, 2. INSURANCE, 3.

After land was sold to one who assumed a mortgage thereon both the mortgagor and the purchaser procured insurance upon the buildings, one of which was afterwards damaged by fire. Action to foreclose the mortgage having been brought, the mortgagor claimed that by reason of certain facts the insurance companies were legally liable to pay the insurance moneys directly to the mortgagee and thus *pro tanto* discharge the mortgage before recourse was had to the property itself. The companies, though not contesting the validity of the policies, denied that they were liable to the mortgagee. *Held*, that such conflicting claims were so closely connected with the subject of the foreclosure action that they should be litigated and determined therein; and the companies were properly impleaded. *Lumbermen's Nat. Bank v. Corrigan*, 82

MOTIONS. See APPEAL, 6. TRIAL, 1.

MOTOR VEHICLES. See HIGHWAYS, 3–6. NEGLIGENCE, 2.

MUNICIPAL CORPORATIONS.

Conveyance of land to city for park: Conditions: Validity. See PERPETUITIES.

Public improvements: Street paving: Right to designate materials.

1. The right given by sub. 2, sec. 925—175, Stats. 1915, to the owners of property fronting upon a proposed street improvement in a city of the third or fourth class, to designate, by petition to the council, the paving material which shall be used, applies only to improvements made pursuant to said sec. 925—175, and has no application where the proceedings for the improvement were under secs. 959—30*a* to 959—30*j*. *Quam v. Fort Atkinson*, 219

Same: Choice between statutory plans.

2. The plan for street improvements provided for in sec. 925—175, Stats. 1915, and that provided for in secs. 959—30*a* to 959—30*j* are separate and distinct, and cities to which both are applicable may choose between them. *Quam v. Fort Atkinson*, 219

Same: Contracts: Construction: Liability of sureties to materialmen, etc. See PRINCIPAL AND SURETY, 4–7.

3. The initial proposal for the construction of a filtration plant for a city provided that the contractor must give a bond "to guarantee the faithful performance of the contract and the payment of all labor and materials." That provision was, by reference,

made a specific part of the contract, which also provided that the contractor was to be paid a certain percentage of the proportionate value of the work done monthly on the estimate of the city engineer, and the balance due as soon as certain city officials were satisfied that the work was completed and that all claims and demands against the contractor "by any subcontractor for work performed or material furnished" were paid; and that before final payment was made the contractor must satisfy the city officials that "all bills for labor and materials used in the work have been paid." The bond given to secure faithful performance of the contract provided: "The surety shall not be liable under this bond to any one except the owner, but it is agreed that the owner, in estimating his damage, may include the claims of mechanics and materialmen arising out of the performance of the contract." *Held* that, construing together these various provisions, that relating to payment of the claims of subcontractors does not limit and restrain the more comprehensive language in the others, but the term "subcontractor" should, rather, be construed in a broad sense, harmonizing with the other language, so as to include all persons having claims for services performed or materials furnished in the construction of the plant, whether done at the request of the principal contractor, a subcontractor, or other person having authority to contract in such behalf. *New York C. J. F. Co. v. Kenosha*, 371

4. Such stipulations in the contract are not deemed to have been made by the city for its own protection only, but also for the benefit of all persons having unpaid claims for labor or materials which entered into the construction of the plant. *Ibid.*

5. In an action against the city by the contractor to recover an unpaid balance of the contract price, the city might properly counterclaim for the amount of such unpaid bills of laborers and materialmen, whether they amount to more or less than said unpaid balance, and the amount thereof, as established, will furnish a basis for an offset or recovery in favor of the city against the plaintiff. *Ibid.*

6. Where the city interposed such a counterclaim, the appropriateness of asking, as part of the prayer for relief, that the various claimants and the surety on the bond be made parties to the action, is doubted; but the purpose to implead all such interested persons, so that the rights and liabilities of all can be established by a single judgment, is approved. *Ibid.*

Same: Assessments for benefits: Taking of property.

7. Under sub. 1, 8, sec. 959—30*f*, Stats., a city, by clear implication, can assess to any abutting parcel of land no more of the cost of a street improvement than the amount of benefits accruing therefrom to such parcel. *Quam v. Fort Atkinson*, 219

8. Assessment of a part or all of the cost of street improvements upon abutting property to the extent of the benefits accruing thereto is not a taking of property for public use without just compensation, within the meaning of sec. 13, art. I, Const. *Ibid.*

Police power: Licensing of street railway cars.

9. A city ordinance imposing an annual license fee of $15 for each car operated or run by a street railway company is not a regulation of street railways under the police power, but is a revenue

measure and is without authority and void, said sum being greatly in excess of the expense of issuing the license and the reasonable cost of inspection and supervision of the business. *Milwaukee E. R. & L. Co. v. Milwaukee,* 384

10. The authority of cities to tax or license street railways for revenue, given by ch. 313, Laws 1860, and sec. 1862, R. S. 1878, was taken away by ch. 363, Laws 1895, and ch. 223, Laws 1897. *Ibid.*

11. Sub. 40, sec. 3, ch. IV, Milwaukee charter (p. 66), authorizing the city to "tax, license, and regulate road vehicles," is not applicable to street cars. *Ibid.*

Vacation of streets.

12. In a city of the second or third class having a special charter, if the provisions in such charter relating to the vacation of streets and alleys are not made exclusive, the common council may, under the authority of sub. 1, sec. 927, Stats., proceed to vacate a street in the manner prescribed in sec. 904, and in such case the resolution of discontinuance may be adopted by a majority vote of the aldermen, even though in such a proceeding taken under the special charter a two-thirds vote is required. *State ex rel. Manitowoc L. & F. Co. v. Kelley,* 91

13. Where the method provided by the general statutes for vacating a street is adopted, that method must be followed throughout the whole proceeding. *Ibid.*

Torts: Lack of water for extinguishing fires: Liability. See NEGLIGENCE, 3.

14. Neither a municipality which has assumed the function of protection against fires by the installing of a waterworks system and a fire department, nor a corporation under contract with a municipality to supply water for such purposes, is liable to individuals for fire losses due to an entire lack or an insufficient supply of water. *Concordia F. Ins. Co. v. Simmons Co.* 541

Same: Improper filling of trenches in streets. See NEGLIGENCE, 1, 2.

Same: Insufficiency of surface-water sewer: Contributory negligence.

15. One who knew that a surface-water sewer was inadequate and that in times of storm water was likely to back up and flood his basement through a connection which he had himself made with the sewer, but did nothing to protect his premises although he might easily have installed a device which would have prevented such flooding, was guilty of contributory negligence precluding a recovery for damages caused by the backing up of the water into his basement. *Hume v. Chilton,* 78

Claims against cities: Disallowance: Time for appeal.

16. The twenty days allowed by sec. 25, ch. VII, of the Eau Claire city charter (Laws 1889, ch. 184) for an appeal from the disallowance of a claim by the common council is doubled, under sec. 2822, Stats., where the claim was one made by the county for aid furnished to poor persons and notice of its disallowance was served by mail as provided in secs. 1512, 2821,—such appeal, though not a "proceeding in a court of record," being the commencement of an action in such a court and the proper, if not the only, way to proceed against the city. *Green Lake County v. Eau Claire,* 304

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 8–15.

NEGLIGENCE.

See CARRIERS, 12, 13, 15. HIGHWAYS. HOSPITALS. JUDGMENT, 2–5. MASTER AND SERVANT, 2–11, 15. RAILROADS, 13–16.

Improper filling of trench in street: Contributory negligence.

1. Where a plumber after digging a trench in a street filled it in the ordinary and usual way but not in the manner or in accordance with the specifications prescribed in his permit to do the work and in the city ordinances, and by reason of his failure to comply with such specifications the street was left in a defective and dangerous condition, he was guilty of negligence rendering him liable for injuries caused by such defect. *Zimmer v. Schmitt,* 430

2. One who, after such trench had been filled, approached the place in an electric automobile at a speed of twelve miles an hour and, although he saw the earth in the street, did not slacken his speed, was not as a matter of law guilty of negligence contributing to an injury sustained when a wheel of his car fell into the trench, there being nothing to indicate to him as he approached that the place was soft or unsafe for travel, and he having the right to assume that the trench had been filled in the manner prescribed by law and therefore was reasonably safe and not in a defective condition. *Lauson v. Fond du Lac,* 141 Wis. 57, distinguished. *Ibid.*

Interference with supply of water for extinguishing fires.

3. Where a city has been supplying water for fire protection and is ready and willing on its part to continue such service and a householder or inhabitant is in a position to receive the benefit thereof, a third person who unlawfully interrupts or interferes with such service is liable for resulting injury to such householder or inhabitant. So *held,* where a private corporation, in driving piles for a building, negligently pierced the intake pipe, thereby rendering useless the city waterworks system, and a building was burned because of the total lack of water to extinguish the fire. *Concordia F. Ins. Co. v. Simmons Co.* 541

Operation of elevator in store.

4. In an action for injuries alleged to have been caused by negligent operation of an elevator in defendant's store, plaintiff and another witness testified positively that the elevator was suddenly set in motion while the doors were open and passengers were leaving it. It was shown that it was a mechanical impossibility to move the elevator while the doors were open, except by the use of an emergency electric button which was ordinarily covered by a glass plate held in position by screws, and two witnesses for defendant testified that such covering was in proper position at the time of the accident. *Held,* that the question of the veracity of the witnesses for the respective parties was involved and was for the jury. *Brendlson v. Ed. Schuster & Co.* 566

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE. See CRIMINAL LAW, 3.

NEW TRIAL.

Motion for, when unnecessary. See APPEAL, 6.

Improper argument to jury.

1. In an action against a city for personal injuries caused by an obstruction on a sidewalk, an order of the trial court granting to plaintiff a new trial on the ground that defendant's counsel had been allowed to use and did use improper argument to the jury, is affirmed. *Sharpley v. Oconto,* 61

Newly discovered evidence. See CRIMINAL LAW, 3.

Error in assessing damages. See HOSPITALS, 2.

Option to remit part of damages: Stay of proceedings: Appeal.

2. The trial court ordered that if, within twenty days, the plaintiff should remit from a verdict in his favor all sums in excess of $5,000, he might enter judgment for that amount, but if he failed so to remit a new trial should be had. Afterwards the court granted a stay of proceedings on the twenty-day clause in said order "until twenty days after return of *remittitur*" on an appeal from the order. *Held,* that such stay of proceedings was beyond the power of the trial court, since its effect would be to give plaintiff the right at his option to enter judgment, irrespective of the determination of the appeal, for an amount fixed in advance by the trial court. *Elmergreen v. Kern,* 560
3. Plaintiff in such case not having remitted the damages within the twenty days limited in the original order, that order became an order for a new trial, and upon the dismissal of the appeal the case stood for trial. *Ibid.*

NONRESIDENTS. See LIMITATION OF ACTIONS. TAXATION, 3.

NOTICE.

Of appeal. See APPEAL, 7.
Of contents of contract. See BILLS AND NOTES, 1. CONTRACTS, 4.
Of dangerous condition of highway. See HIGHWAYS, 2, 3. NEGLIGENCE, 2.
Of disallowance of claim. See MUNICIPAL CORPORATIONS, 16.
Of drainage proceedings. See DRAINS, 1.
Of hearing. See WORKMEN'S COMPENSATION, 16.
Of injury. See WORKMEN'S COMPENSATION, 10–12.
Of trial. See VENUE, 5.
To remodel tenement house. See CONSTITUTIONAL LAW, 2.

OFFICERS.

Action to try title to office. See QUO WARRANTO.

Compelling performance of duty. See DRAINAGE, 3, 4.

Ratification of acts of agent. See COUNTIES.

Public officers may ratify those acts of an agent which they had authority to direct him to do when done and which they could authorize at the time of ratification. *Wade v. Sheboygan County,* 98

Liability on official bond. See EXECUTION, 4–7.

Sheriffs. See EXECUTION.

Clerk of court. See EXECUTION, 3.

Town officers. See COUNTIES. DRAINS, 3–5.

OFFICIAL BONDS. See EXECUTION, 4–7.

OMISSIONS, MISTAKES, AMENDMENTS, ETC. See EXECUTION, 6. PARENT AND CHILD, 3. REPLEVIN, 2. TRIAL, 3. WATERS, 2. WORKMEN'S COMPENSATION, 13–16.

OPINION EVIDENCE. See CRIMINAL LAW, 1. EVIDENCE, 7, 8.

ORDERS. See APPEAL, 1–5. GUARDIAN AND WARD. TRIAL, 2. VENUE, 2.

PARENT AND CHILD.

See GIFTS. INSURANCE, 6. TRUSTS AND TRUSTEES, 1.

Care and custody of children: Parents' rights. See JUVENILE COURTS.

1. No notice of the proceeding for commitment of children to the state public school being required by the statute to be given to the parents, such commitment does not foreclose the right of the parent, when competent, to resume the care and custody of the children; and the fact that the parent was present at the hearing before commitment is immaterial. *Guardianship of Knoll,* 461
2. Where children were committed to the state public school on the ground that their father had abandoned them and their mother was not a fit and proper person to have their care, custody, and control, the county court has jurisdiction afterwards, upon a proper petition by the mother stating the facts and alleging her present ability to support and care for the children and that because of reformation or for some other reason she is now a fit and proper person to have their care and custody, to determine the question whether such care and custody should be awarded to her and to make an order accordingly. *Ibid.*
3. A petition by the mother in such a case, asking that she or some other suitable person be appointed guardian of the children, is treated as asserting the mother's right to their care and custody, and the amendment thereof so as to state the proper grounds upon which to proceed is permitted. *Ibid.*
4. The proceeding upon a proper petition in such case is not strictly a proceeding to appoint a guardian, but is nevertheless one which affects the person and the right to the custody of minors who, under sec. 573*f* and the general provisions of the statutes relating to guardianship of minors, are in effect wards of the court. *Ibid.*
5. The jurisdiction of the county court in such a case is concurrent with that of the circuit court in like matters; but such jurisdiction of the circuit court will not be exercised originally unless it appears that the county court cannot grant relief as adequate, complete, prompt, and efficient as can be granted by the circuit court. *Ibid.*

PARKS: Lands conveyed for. See PERPETUITIES.

PAROL EVIDENCE affecting writings. See EVIDENCE, 6.

PARTIES.

Who are parties to appeal. See APPEAL, 7.

Real party in interest. See ASSIGNMENTS.

Plaintiffs: Who may sue. See BANKS AND BANKING, 1–3. INSURANCE, 1, 7, 13. PRINCIPAL AND SURETY, 1, 7. WORKMEN'S COMPENSATION, 20.

Defendants: Joinder: Bringing in new parties. See EXECUTION, 6. INSURANCE, 3. MORTGAGES. MUNICIPAL CORPORATIONS, 6. PARTNERSHIP, 15.

In a tort action, where a judgment holding the defendant liable will not affect his right to contribution from others whose concurring acts contributed to the wrong and, even if such others are brought in as defendants, the judgment cannot determine the rights of the defendants among themselves on the question of contribution, the trial court should exercise its discretion under sec. 2610, Stats., and deny an application, by the defendant originally sued, to have such others made parties. The right of the plaintiff in such a case to make his own election in the matter of joining tortfeasors as defendants should be preserved. *Bakula v. Schwab,* 546

PARTNERSHIP.

Contract construed: Mutual rights and liabilities of partners: Consideration: Accounts.

1. An agreement between F., who was an experienced woodsman, and five other persons for the purchase of land and timber provided that F. should go South and look over such tracts as he thought it would be profitable for the parties interested to purchase and should work exclusively for the interests of this syndicate or association of persons; that all his expenses should be paid by those interested proportionately but there should be no pay for his services or for any other person interested; that he was "not to furnish any of the purchase money for all or any of the lands so to be purchased, but that it is to be provided by the other five members of the syndicate and he to be charged with interest at the rate of six per cent., payable annually;" and that the interest of all should "be the same in the land. One sixth each. F. interest same as others, one sixth." *Held,* that there was no obligation on F.' part to furnish, and no right on the part of the other partners to charge him with, or deduct from his one-sixth interest in any sale of the lands, one sixth of the original purchase price. If he were so charged he would in effect "furnish" a part of the purchase money, and the others would not "provide" it, but merely advance it, contrary to the terms of the agreement. *Keith v. Rust L. & L. Co.* 528
2. Under such agreement F. was to have, not merely a one-sixth interest in the proceeds or net profits from the sale of the land, but, equally with each of the others, a one-sixth interest in the land; and this interest was to vest at the same time, to the same effect, and with exactly the same conditions and limitations, and none other, as the respective interests of the other five. *Ibid.*
3. The experience, integrity, and standing of F., together with the time and energy necessarily expended by him for several years, constituted a sufficient consideration moving from him to support the contract. *Ibid.*
4. The provision that F. was "to be charged with interest at the rate of six per cent., payable annually," construed in connection with the other provisions, means that he was to be charged in favor of the other five partners with interest annually on a sum equal to one sixth of the purchase price as it was from

time to time paid for the land, until there should be realized from sales a sum equal to the entire purchase price with accrued interest. *Ibid.*

5. The retention by F., without apparent objection, of a statement of account sent to him about two years before his death by the defendant corporation (to which the interests of the other five partners had been transferred), which account included a charge against him for one sixth of the purchase price of the lands and interest thereon, cannot be held to bind him as to that charge, nor can the other parties assert such a declaration on their part, as against the terms of the written agreement in that respect. *Ibid.*

6. A subsequent charge made by said corporation, without further notification to or consultation with F., for a "portion of office and clerk's services," covering a number of years prior to the sending of the statement above mentioned, could not properly be allowed, both because it was a material change in the account after it had been rendered to F., and because its allowance would be in effect an allowance for services, directly contrary to the terms of the contract. *Ibid.*

7. Another subsequent charge made by the corporation for a portion of the salary and expenses of one D. in looking after a part of the lands, covering a considerable time prior to the rendering of the account as above stated, and a charge for interest on this item, should have been disallowed for the reasons above stated and also because there was no proof of actual payment of said salary and expenses. *Ibid.*

8. The allowance of interest upon the personal account of F. with the defendant corporation is *held* to have been proper. *Ibid.*

9. If the balance found due to the defendant corporation upon the personal account of F. should be larger than the balance found due from the corporation on the land transaction, the amount of the difference in favor of defendant cannot be adjudged to be a lien upon the interest which F. had in the remaining lands, no such lien having been created by act of F. and there being no warrant therefor in the contract. *Ibid.*

[10. Whether attorneys representing the estate of F. would have authority, by a stipulation that any balance found due the defendant should be a lien, to bind the estate and so affect the rights of creditors, is not decided.] *Ibid.*

Action against partners: Part only served: Judgment against all. See JUDGMENT, 1.

Same: Counterclaim: By one on behalf of all.

11. Where plaintiff's cause of action arises out of the joint obligation of members of a copartnership who contracted with him, and he had the right to judgment against all the members of the firm liable under the contracts, the defendants so jointly liable were entitled to counterclaim for any legal claims they had against plaintiff arising out of such contracts and connected with the subject of the action. *Progress Blue Ribbon Farms v. George,* 228

12. The fact that some of the partners had not been served with summons in the action did not defeat their right to have those who were served appear and secure judgment in favor of all members of the firm. *Ibid.*

13. One member of such copartnership might interpose a counterclaim on behalf of all; and where the allegations of a counterclaim by one of the defendants served, though not harmonious throughout, could not be interpreted otherwise than as applying only to partnership matters arising out of and connected with the transactions forming the basis of the complaint, such counterclaim must be deemed to be on behalf of the copartnership and all its members. *Ibid.*

Dissolution of corporate partner of individual: Rights of survivor.

14. A corporation and an individual together contracted to do certain work. After the work had been completed and after an action by both the corporation and the individual as plaintiffs had been brought against the other party to the contract for a balance due thereon, the corporation was dissolved and three years later, under sec. 1764, Stats., ceased to be a body corporate for any purpose. Thereafter the individual plaintiff died, and the action was revived in the name of his administratrix as sole plaintiff. *Held*, that whatever interest and ownership there was in the funds in question passed on the death of the corporation, as it would have passed on the death of an individual copartner, to the surviving partner, so far at least as the defendant was concerned, and that the amount recovered in the action is properly payable to the plaintiff administratrix. *Peters v. Nat. Surety Co.* 131

Death of one partner: Claim against his estate for firm debt.

15. Where one of two partners jointly indebted upon a firm contract dies, the creditor may, under sec. 3848, Stats., establish his claim against the estate of the decedent as if the liability were several and without making the surviving partner a party to the proceeding. *W. E. Smith L. Co. v. Estate of Fitzhugh*, 355

PART PERFORMANCE. See LANDLORD AND TENANT, 1.

PASSENGERS: Injury to. See MASTER AND SERVANT, 15.

PAVING OF STREETS. See MUNICIPAL CORPORATIONS, 1, 2, 7, 8.

PAYMENT. See BILLS AND NOTES. CONTRACTS, 2–15. EXECUTION, 1–4. VENDOR AND PURCHASER, 1, 4, 5.

PENALTIES incurred under contract. See CONTRACTS, 5.

PERFORMANCE. See LANDLORD AND TENANT, 1. MASTER AND SERVANT, 1. TRUSTS, 1.

PERPETUITIES.

Land conveyed to a municipality for a public park is given or granted to a "charitable use," and conditions annexed to the grant are not subject to the restrictions contained in secs. 2038, 2039, Stats., in respect to the suspension of the absolute power of alienation. *Williams v. Oconomowoc*, 281

PERSONAL INJURIES. See APPEAL, 11. ASSIGNMENTS. CARRIERS, 15. DAMAGES, 2. EVIDENCE, 4, 8. HIGHWAYS. HOSPITALS. JUDGMENT, 2–5. MASTER AND SERVANT. NEGLIGENCE, 1, 2, 4. NEW TRIAL. PRINCIPAL AND SURETY, 7. RAILROADS, 15, 16. TRIAL, 2.

PERSONAL PROPERTY. See APPEAL, 4, 5. BANKS, 1–3. BILLS AND NOTES. CARRIERS, 1–13. CONTRACTS, 6–8. COURTS, 2, 3. DEEDS, 1. FRAUD, 4–6. GIFTS. RECEIVING STOLEN PROPERTY. REPLEVIN. SALES. TRUSTS, 4. WILLS, 6.

PERVERSE VERDICT. See TRIAL, 2.

PHYSICIANS AND SURGEONS.

See CRIMINAL LAW, 1, 2. DEEDS, 2. EVIDENCE, 8. HOSPITALS, 2.

1. The conviction of a physician of the offense of having used instruments in the treatment of a pregnant woman with intent to procure a miscarriage, is *held* to be sustained by the evidence. *Rodermund v. State,* 577
2. It is immaterial in such case, under sec. 4583, Stats., whether or not a miscarriage was in fact procured, if the instruments were used with intent to procure a miscarriage. *Ibid.*
3. Upon conviction in such case a revocation of the defendant's license to practice medicine and surgery was properly adjudged, under sec. 1435*i*, Stats. That section does not provide for an additional criminal punishment, constituting cruel and unusual punishment within the meaning of sec. 6, art. I, Const. It merely provides that the court shall do directly and forthwith in the criminal proceeding what might be done in subsequent civil proceedings. *Ibid.*
4. The word "shall" in said sec. 1435*i*, Stats., is mandatory, the legislative intention being that a criminal conviction shall be conclusive as to the unfitness of the licensee to continue in the practice of his profession. *Ibid.*
5. The term "crime," as used in sec. 1435*i*, Stats., embraces the violation of any penal law of the state, and includes all felonies and misdemeanors under the law of the state committed by the offender "in the course of his professional conduct." *Ibid.*

PLACE OF TRIAL. See VENUE.

PLEADING.

Complaint or petition: Sufficiency: Form of action. See DEEDS, 4, 5. EXECUTION, 6. PARENT AND CHILD, 3. TRIAL, 1. WATERS, 2. WORKMEN'S COMPENSATION, 13.

Same: Striking out irrelevant matter.

1. In an action to recover a part of the amount charged and retained by attorneys for services in connection with a land contract, the plaintiffs having ratified the settlement made by defendants, pursuant to which a warranty deed was given to the purchaser upon payment of the sum due, and the only question at issue being whether defendants' charges were unreasonable, it was not error to strike from the complaint an allegation that defendants had induced plaintiffs to sign the warranty deed when they thought they were signing a different instrument. *Hollingworth v. Shannon,* 224

Answer: Supplementary answer. See DIVORCE, 3, 4, 12.

Same: Counterclaim. See DIVORCE, 4. MARRIAGE, 5. MUNICIPAL CORPORATIONS, 6. PARTNERSHIP, 11–13. REPLEVIN. UNLAWFUL DETAINER.

Demurrer. See DEEDS, 4, 5. VENDOR AND PURCHASER, 2.

Same: To cross-complaint.

2. Where a new defendant is brought in under sec. 2656*a*, Stats., to answer a cross-complaint, a demurrer by him should, in ordi-

nary cases at least, be directed to the cross-complaint, not to the original complaint, although he may answer the latter if he chooses. *Lumbermen's Nat. Bank v. Corrigan,* 82

Amendment of pleadings. See EXECUTION, 6. PARENT AND CHILD, 3. WATERS, 2.

POLICE POWER. See CONSTITUTIONAL LAW. MUNICIPAL CORPORATIONS, 9.

POOR PERSONS. See MUNICIPAL CORPORATIONS, 16.

POSSESSION.
Of land. See LANDLORD AND TENANT. TRUSTS, 1. UNLAWFUL DETAINER.
Of personal property. See REPLEVIN.

PRACTICE: Simplification.
Mistakes, omissions, amendments, etc. See PARENT AND CHILD, 3. REPLEVIN, 2. TRIAL, 3. WATERS, 2. WORKMEN'S COMPENSATION, 13–16.
Joinder of causes of action and connected claims: Bringing in new parties. See EXECUTION, 6. INSURANCE, 3. MORTGAGES. MUNICIPAL CORPORATIONS, 6. PARTIES.

PRESCRIPTION. See WATERS AND WATERCOURSES.

PRESUMPTIONS. See WILLS, 1.

PRINCIPAL AND AGENT.

See BROKERS.

Payment to agent. See EXECUTION, 3.

Ratification of unauthorized acts of agents. See COUNTIES. INSURANCE, 6. OFFICERS. TELEGRAPHS, 3, 4.

1. A person cannot retain the avails of an unauthorized contract, made for his benefit by another assuming to act as his agent, and repudiate the responsibilities of such contract, and any attempt so to do, with full knowledge of the facts, constitutes a ratification of the unauthorized act and creates a liability on the part of such person to the same extent as if such contract were originally authorized. *Gnat v. Westchester F. I. Co.* 274
2. The question whether or not there has been a ratification of an agent's wilful act is generally for the jury; but the evidence may be so clear and uncontradicted that the court may decide the question as one of law. *Marlatt v. W. U. Tel. Co.* 176

Contract to procure agency, etc. See FRAUD, 4–6.

PRINCIPAL AND SURETY.

Liability of surety: On bond of sheriff. See EXECUTION, 4–7.

Same: On bond of contractor: Payment for materials and labor.

1. Where a contractor's bond expressly obligates the signers thereof to pay for the material and labor entering into the construction called for by the contract, materialmen and laborers may maintain an action against the sureties. *Builders L. & S. Co. v. Chicago B. & S. Co.* 167
2. The doctrine that contracts of suretyship are to be strictly construed and the liability of the sureties is not to be extended by implication or presumption, does not mean, even as to ordinary sureties, that such contracts are not to be reasonably interpreted as other contracts are. *Ibid.*

3. A contractor's bond given by a surety company for a money consideration has all the essential features of an insurance contract and is not to be construed according to the rules applicable to ordinary accommodation sureties. *Ibid.*

4. Where the bond of a contractor for municipal work is conditioned that he shall "fully and faithfully perform all the conditions and covenants contained in the contract," and in the contract he covenants to "pay in full for all labor employed and materials used," the two instruments must be construed together and the surety is thereby as "expressly" bound to pay for labor and materials as if this were stated in the bond itself. *Ibid.*

5. The fact that one who merely furnishes materials to a contractor does so under a written contract does not affect his status as a materialman or make him a "subcontractor" in such a sense that he is not within the protection of a surety bond which secures payment for materials. *Ibid.*

6. A materialman did not waive his rights under such a bond by continuing to furnish materials after the contractor's default in making certain payments when due, there having been no modification of contract, extension of time, or other agreement, act, or omission which released the surety. *Ibid.*

Same: Injuries to employee of contractor.

7. In a contract with a city for the construction of sewers, executed by the contractor and his sureties, he agrees to maintain barriers and lights to prevent the happening of accidents for which the city might be liable; both the contractor and the sureties assume liability for and agree to pay all damages occasioned by the digging up, use, or occupancy of any street by him "or which may result from the carelessness of said [contractor], his agents, employees, or workmen;" and the sureties further covenant to pay to the city all damages and sums of money which the contractor shall be liable to pay to the city under the contract, and that they will indemnify and keep harmless the city against all liability which may in any wise result from the carelessness or neglect of said contractor, his agents, employees, or workmen. *Held*, that the liability of the sureties is limited to the payment of such sums of money as the city might become liable for; that the clause above quoted was not intended for the benefit of third persons; that the "carelessness" therein referred to is not the failure to exercise ordinary care in the protection of workmen, but relates to the maintenance of barriers, etc., for the failure to maintain which the city might be made liable; and hence that the sureties are not liable for injuries to a workman caused by the caving in of the sides of a ditch which was being dug by the contractor. *Stankiewicz v. Prange*, 607

PROCESS.

Service by publication: Order for mailing: Dismissal of action.

1. An order for service by publication directing that "plaintiffs or their attorneys deposit a copy of the summons and complaint in the above entitled action, be sent to the last known address of the defendants, if the same can be ascertained, and if not, a mailing of a copy of the summons and complaint to be omitted," was fatally defective under sec. 2640, Stats., there being a sub-

stantial failure to comply with statutory requirements jurisdictional in their nature. *De Fyn v. Power*, 342

2. Where the proceedings in an action to set aside a conveyance of land alleged to have been procured by fraud were regular up to and including the filing of notice of *lis pendens*, defects in an order for service by publication, while they may require the setting aside of such service, do not require the dismissal of the action, since a new and valid order of publication may be procured. *Ibid.*

Service on part of defendants. See JUDGMENT, 1. PARTNERSHIP, 12, 13.

"Legal process, fair on its face:" Summary order of bankruptcy court for delivery of property. See CARRIERS, 4–8.

PROMISSORY NOTES. See BILLS AND NOTES.

PROXIMATE CAUSE. See HOSPITALS. MASTER AND SERVANT, 4. RAILROADS, 13, 16. WORKMEN'S COMPENSATION, 18.

PUBLICATION of summons. See PROCESS.

PUBLIC HEALTH. See CONSTITUTIONAL LAW.

PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 1–8. PRINCIPAL AND SURETY, 7.

PUBLIC OFFICERS. See OFFICERS.

PUBLIC PARKS. See PERPETUITIES.

PUBLIC POLICY. See DIVORCE, 9. MARRIAGE, 3–5.

PUNITORY DAMAGES. See DAMAGES, 1. TELEGRAPHS, 3, 4.

QUIETING TITLE. See EXECUTION, 6.

QUO WARRANTO.

In an action of *quo warranto* to try title to an office, the burden of showing that alleged illegal voters were at the time of the election not residents of the town in which they voted, is upon the party alleging that fact. *State ex rel. Catlin v. Galligan*, 487

RAILROAD COMMISSION. See RAILROADS, 3–10.

RAILROADS.

As carriers. See CARRIERS.

Building of extensions and spur tracks: Powers of railroad commission.

1. An "extension" of the line of a railroad must, when built, be operated by the company as a common carrier, serving the public thereby on equal terms. If differs in this respect from a "spur track," which, though a part of the railroad system, is in its essence a facility for one shipper or for several shippers, who contribute to its construction. *Menasha Woodenware Co. v. Railroad Comm.* 19

2. The service of any particular spur track being denied to no industry which it is reasonably feasible for the spur to serve and which contributes an equitable share of the cost of construction, so that all concerns having occasion to use the track in their business transactions with the public are given the right to use it on the same equitable terms, the use is a "public use," al-

though not of precisely the same quality as the public use which pertains to an extension of the main line of a railroad. *Ibid.*

3. A refusal by the railroad commission to grant a certificate of convenience and necessity for the building of an extension (under sec. 1797—44, Stats.) does not prevent the commission from ordering the construction of a spur track (under sec. 1797—11*m*) over the same route or a part thereof. *Ibid.*

4. Where the railroad commission has found the existence of the essential conditions authorizing it to order the construction of a spur track, the court, in an action brought under sec. 1797—16, Stats., to vacate such order, does not try those questions of fact like a court of first instance, but only determines whether the order is "unlawful or unreasonable," and upon this question the burden of proof is upon the plaintiff to show the fact by clear and satisfactory evidence. If reasonable men might well differ as to the correctness of the order it cannot be held unreasonable. *Ibid.*

5. Where the owner of a lumber mill owned also a stock of standing timber fifty or sixty miles away which it had bought for the express purpose of furnishing material for the operation of the mill, the cutting of such timber, the shipping of the logs to the mill, and the manufacture of them into lumber are all component parts of one "industry or enterprise," within the meaning of sec. 1797—11*m*, Stats. *It seems* that a logging industry pure and simple, not connected with a mill, may be an "industry or enterprise" within the meaning of the statute. *Ibid.*

6. A finding by the railroad commission, as a basis for an order requiring the building and operation of a spur track, that such spur was "practically indispensable to the successful operation of" the industry above mentioned, cannot be held unreasonable where there was evidence that a considerable saving in the transportation of logs to the mill would result, even though reasonable minds might differ on the proposition that such saving was practically indispensable. *Ibid.*

7. "Practically indispensable," in sec. 1797—11*m*, Stats., does not mean so essential that the industry would go into bankruptcy without it. "Successful operation" presupposes efficient and economical operation relieved from undue burdens, and means also operation yielding a reasonable profit. *Ibid.*

8. The fact that, if a spur be constructed by one railroad, another railroad will lose the carriage of millions of feet of logs, is to be carefully considered but is not controlling upon the question whether an order should be made requiring the spur to be built; and where the railroad commission has made such order it cannot be held that the spur would be "unreasonably harmful to public interest" (sec. 1797—11*m*, Stats.), if reasonable men can say that countervailing considerations, such as the continued successful operation of a great industry employing many men, will outweigh any injury suffered by the public as a result of the decrease in the revenues of said other railroad. *Ibid.*

Grade crossings: Vacation of streets: Damages.

9. Secs. 1797—12*e*, 1797—12*f*, Stats. 1915, authorizing the railroad commission to order the "closing of a highway crossing and the substitution of another therefor not at grade," does not require the furnishing of a separate new crossing not at grade in place of each grade crossing closed, but contemplates that one rea-

sonably convenient crossing not at grade may take the place of several near-by grade crossings. *Chicago & N. W. R. Co. v. Railroad Comm.* 185

10. The power of the state to vacate parts of streets may be delegated to the railroad commission, and may be exercised by said commission in carrying out the purposes of secs. 1797—12*e*, 1797—12*f*, Stats. 1915. *Ibid.*

11. Where a part of a street is vacated pursuant to said statutes, the damages are to be assessed in condemnation proceedings instituted by the railroad company under the general statutes on that subject. *Ibid.*

12. Such damages are to be assessed only for land actually taken and for the injury to adjacent lots resulting from the change of grade in front of them. The "special damages . . . by reason of such change in the grade," provided for in sub. 2, sec. 1797—12*e*, do not include mere consequential damages to the owners of lots not physically affected, resulting from a vacation of a portion of the street. *Ibid.*

Accidents at crossings: Excessive speed: Collisions. See ASSIGNMENTS. CONTRIBUTION.

13. The running of a railway train at an excessive rate of speed, in violation of law, at the time of a collision with an interurban car was negligence; and it was a proximate cause of the accident where the collision would not have occurred had the train been running at lawful speed. *Ellis v. C. & N. W. R. Co.* 392

14. A finding by the jury, sustained by the trial court, that at the time of the collision the railway train was running at a speed in excess of twelve miles per hour, cannot be disturbed on appeal, the evidence on that question being conflicting. *Ibid.*

Injuries to persons on or near tracks.

15. While walking, on a cold winter day, with his head wrapped in heavy clothing, upon the sidewalk in a public street, the curb being twenty-four inches from the nearest rail of defendant's track, plaintiff was struck from behind and injured by the tank of an engine which was drawing a train on said track at a speed of ten or twelve miles an hour. There was evidence that the engine bell was not rung or the whistle blown; also that shortly before the accident plaintiff had looked to see whether a train was approaching and that none was coming and he heard none. *Held*, that he was not guilty of contributory negligence as a matter of law either in walking as he did or in failing to see or hear the approaching train. *Prohl v. Chicago, M. & St. P. R. Co.* 443

16. In an action against a railway company to recover for loss of services of plaintiff's son, caused by injuries, notwithstanding testimony that at the time of the accident the boy had climbed upon a moving car, it is *held* that there was credible evidence sufficient to sustain findings by the jury to the effect that he was run over while crossing the track between the forward cars of a freight train and a rear-end section which, having been uncoupled while the train was still moving, continued in motion; that the proximate cause of the injuries was defendant's negligence in failing to give warning to the boy of the approach of the rear-end section; and that there was no contributory negligence on the boy's part. *Delvaux v. K., G. B. & W. R. Co.* 586

Injuries to employees. See MASTER AND SERVANT, 2–11.

RAPE.

1. Although the circumstances of the crime were unusual, the testimony of the prosecutrix, corroborated by the facts that her hymen was ruptured and that the accused attempted to settle the matter, is *held* to sustain a conviction of rape. *Simmons v. State*, 36
2. Where rape is alleged to have been committed upon a girl in her sixteenth year before the age of consent was raised to sixteen, her youth and her ignorance of the true character of the act are entitled to much weight in determining whether there was a sufficient showing of the utmost resistance. *Ibid.*

RATIFICATION. See COUNTIES. INSURANCE, 6. OFFICERS. PRINCIPAL AND AGENT. TELEGRAPHS, 3, 4.

REAL-ESTATE AGENTS. See BROKERS.

REAL PARTY IN INTEREST. See ASSIGNMENTS.

REAL PROPERTY. See ATTORNEY AND CLIENT. BROKERS. CONSTITUTIONAL LAW, 1–3. DEEDS. DIVORCE, 8, 9. DOWER. DRAINS. EMINENT DOMAIN. EXECUTION. FRAUD, 4. HUSBAND AND WIFE, 2. INSURANCE, 1–6. LANDLORD AND TENANT. MILLS AND MILL-DAMS. MORTGAGES. MUNICIPAL CORPORATIONS, 1, 2, 7, 8. PARTNERSHIP, 1–10. PERPETUITIES. PLEADING, 1. RAILROADS, 11, 12. REPLEVIN. TRUSTS. UNLAWFUL DETAINER. VENDOR AND PURCHASER. WATERS. WILLS, 5.

REASONABLE CERTAINTY. See INSTRUCTIONS TO JURY, 3.

REASONABLE DOUBT. See HOMICIDE, 3, 4.

REASONABLENESS.
Of order or finding. See RAILROADS, 4, 6, 8.
Of use of stream. See WATERS, 3–5.
Of attorneys' charges. See ATTORNEY AND CLIENT. PLEADING, 1.

RECEIVERS. See APPEAL, 4, 5. CARRIERS, 3–9. CORPORATIONS, 2.

RECEIVING STOLEN PROPERTY.

In a prosecution under sec. 4417, Stats., for knowingly receiving stolen property it was proper to instruct the jury that defendant was guilty if he purchased the property "under such facts and circumstances that he ought to have known" that it was stolen. *State v. Jacobs*, 299

RECITALS in attestation clause. See WILLS, 1.

RECORD on appeal. See APPEAL, 8.

REDEMPTION from execution sale. See EXECUTION.

RE-ENTRY for condition broken. See DEEDS, 5.

REFORMATION OF INSTRUMENTS. See INSURANCE, 2. REPLEVIN, 3.

RELEASE.
Of claim for damages. See MASTER AND SERVANT, 12, 13.
Of sureties. See PRINCIPAL AND SURETY, 6.

RELIEF from judgment, order, etc. See TRIAL, 3.

REMEDIES. See CARRIERS, 11. COURTS. DEEDS, 4. DOWER, 2. DRAINS, 2–5. EXECUTION, 6. FRAUD, 1, 2. INSURANCE, 1–3. JUDGMENT, 1. LANDLORD AND TENANT, 1. MARRIAGE, 4, 5. MORTGAGES. PARENT AND CHILD. PARTNERSHIP, 15. STATES. TRIAL, 1, 3. UNLAWFUL DETAINER. VENDOR AND PURCHASER, 4, 5.

REMISSION of part of damages. See APPEAL, 11. NEW TRIAL, 2, 3.

REPAIRS. See WORKMEN'S COMPENSATION, 6, 7.

REPLEVIN.

Counterclaim for fraud in exchange of property.

1. In replevin for personal property which plaintiff was to receive in exchange for land conveyed to defendant, although no contract or transaction was set forth in the complaint the defendant properly pleaded a counterclaim for fraud of the plaintiff by which defendant was induced, at the time of making the exchange, to accept a deed of the land by the terms of which he assumed a mortgage thereon instead of getting a clear title,—such cause of action being "connected with the subject of the action" within the meaning of sec. 2656, Stats. *De Groot v. Veldboom,* 107
2. A special verdict in such action containing a finding of the fraud but no finding as to whether or not defendant was negligent in accepting the deed, was defective, but under sec. 2858*m*, Stats., no request for a submission of the latter question having been made, the fact must be deemed to have been found by the court against the plaintiff in conformity with the judgment against him. *Ibid.*
3. No reformation of the deed having been sought, the defendant, who recovers damages for the fraud, will be bound by the terms of the deed and must pay the mortgage debt. *Ibid.*
4. In replevin for personal property which plaintiff was to receive in an exchange, where defendant counterclaimed for plaintiff's fraud in connection with the exchange, a judgment awarding the property to plaintiff and damages to defendant on his counterclaim was proper in form and did not constitute two judgments. *Ibid.*

RESCISSION of contracts. See CONTRACTS, 16. FRAUD, 6.

RESIDENCE. See ELECTIONS. QUO WARRANTO.

RESISTANCE. See RAPE, 2.

RES JUDICATA. See JUDGMENT, 3–5.

REVOCATION of license to practice. See PHYSICIANS AND SURGEONS, 3–5.

RIPARIAN RIGHTS. See WATERS.

RIVERS. See MILLS AND MILLDAMS. WATERS.

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 1, 2, 7, 8, 12, 13. RAILROADS, 9–12.

RULES OF COURT.
Supreme court rules. See pages 637–651.
Circuit court rules: Amendments. See pages 652, 653.

SALES.

Construction of contract. See BILLS AND NOTES, 2.

Same: Entire or severable contract. See CONTRACTS, 1.

Remedies of seller: Insolvency of buyer: Stoppage in transitu. See APPEAL, 4, 5. CARRIERS, 1–10.

Same: Action for price: Defenses: Fraud: Evidence.

1. Where, in an action upon promissory notes given for a part of the purchase price of an electric lighting plant, one defense was that the purchase had been induced by fraud, parol evidence as

to conversations and discussions between the parties to the sale, leading up to the execution of a written contract, was competent on that issue, the terms of the written contract not being sought to be varied thereby. *Bank of Evansville v. Kurth,* 43

Remedies of buyer: Rescission. See FRAUD, 4–6.

Same: Recovery of interest on advances.

2. A finding by the trial court in this case that it was agreed between the parties to a contract for the sale of lumber that advances made by the purchaser to the vendor in excess of a certain sum per thousand feet should bear interest at six per cent. per annum until repaid, is *held* to be sustained by the evidence. *W. E. Smith L. Co. v. Estate of Fitzhugh,* 355

SALES OF LANDS. See ATTORNEY AND CLIENT. BROKERS. DEEDS. EXECUTION. INSURANCE, 1–3. MORTGAGES. REPLEVIN. VENDOR AND PURCHASER.

SERVICE.
Of notices. See APPEAL, 7. DRAINS, 1.
Of summons. See JUDGMENT, 1. PARTNERSHIP, 12, 13. PROCESS.

SETOFF AND COUNTERCLAIM. See CONTRACTS, 13. DIVORCE, 4. MARRIAGE, 5. MUNICIPAL CORPORATIONS, 5, 6. PARTNERSHIP, 11–13. REPLEVIN. UNLAWFUL DETAINER.

SETTLEMENT. See MASTER AND SERVANT, 12, 13.

SEWERS. See MUNICIPAL CORPORATIONS, 15. PRINCIPAL AND SURETY, 7.

SHERIFFS. See EXECUTION.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS, 7, 8.

SPECIAL VERDICT. See TRIAL.

SPECIFIC PERFORMANCE. See LANDLORD AND TENANT, 1. UNLAWFUL DETAINER, 2.

SPUR TRACKS. See RAILROADS, 1–8.

STATE AND FEDERAL STATUTES. See MASTER AND SERVANT, 3–5, 10, 11.

STATE BOARD OF CONTROL. See GUARDIAN AND WARD.

STATE PUBLIC SCHOOL. See GUARDIAN AND WARD. PARENT AND CHILD.

STATES.

See WATERS AND WATERCOURSES, 4, 5.

Ch. 624, Laws 1913, authorizing this plaintiff to bring suit against the state, did not create or admit any liability on the part of the state, but merely waived its immunity from being sued by one of its citizens. *Apfelbacher v. State,* 233

STATUTE OF FRAUDS. See LANDLORD AND TENANT, 1. VENDOR AND PURCHASER, 1, 2.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Constitutionality. See BRIDGES. CONSTITUTIONAL LAW. JUVENILE COURTS, 1, 2. PHYSICIANS AND SURGEONS, 3.

Construction. See APPEAL, 1, 2. BANKS, 4, 5. BILLS AND NOTES, 2. CARRIERS, 1. CONSTITUTIONAL LAW, 1. CORPORATIONS. COSTS, 1. COUNTIES. CRIMINAL LAW, 1, 4. DIVORCE. DOWER. DRAINS.

ELECTIONS. EMINENT DOMAIN. EXECUTION, 7. EXECUTORS. GUARDIAN AND WARD. HIGHWAYS, 2. HOMICIDE, 1, 2. INFANTS. INSURANCE, 11. JUDGMENT, 1. JUVENILE COURTS. LANDLORD AND TENANT, 1. LIMITATION OF ACTIONS. MARRIAGE, 1, 3, 5. MASTER AND SERVANT, 3–5, 10, 11. MILLS AND MILLDAMS. MUNICIPAL CORPORATIONS, 1, 2, 7, 8, 11–13, 16. PARENT AND CHILD, 4. PARTIES. PARTNERSHIP, 14, 15. PERPETUITIES. PHYSICIANS AND SURGEONS. PLEADING, 2. PROCESS, 1. RAILROADS, 1–12. RECEIVING STOLEN PROPERTY. REPLEVIN, 1, 2. STATES. TAXATION. TELEGRAPHS, 2. TRIAL, 3. TRUSTS, 2. UNLAWFUL DETAINER, 1. VENDOR AND PURCHASER, 1, 2. WITNESSES, 2, 3. WORKMEN'S COMPENSATION, 1–16, 20.

Where the written law is plain, there is no room for construction even if results do not seem to be in accordance with exact justice. *Wis. Lakes I. & C. Co. v. Industrial Comm.* 122

Retroactive statutes. See CONSTITUTIONAL LAW, 1.

Mandatory or directory. See PHYSICIANS AND SURGEONS, 4.

Repeal. See MUNICIPAL CORPORATIONS, 10.

Ancient statutes as part of common law: Suspension. See DOWER.

Foreign statutes: Conflict of laws. See MARRIAGE, 1–3. WORKMEN'S COMPENSATION, 20.

Federal and state statutes. See MASTER AND SERVANT, 3–5, 10, 11.

STAY OF PROCEEDINGS. See NEW TRIAL, 2.

STIPULATIONS. See PARTNERSHIP, 10.

STOCK AND STOCKHOLDERS. See CORPORATIONS. EVIDENCE, 5.

STOLEN PROPERTY. See RECEIVING STOLEN PROPERTY.

STOPPAGE IN TRANSITU. See CARRIERS, 1–10.

STREAMS. See MILLS AND MILLDAMS. WATERS.

STREET AND INTERURBAN RAILWAYS. See ASSIGNMENTS. CONTRIBUTION, 2. MUNICIPAL CORPORATIONS, 9–11. RAILROADS, 13, 14.

STREETS. See EMINENT DOMAIN. HIGHWAYS. MUNICIPAL CORPORATIONS, 1, 2, 7, 8, 12, 13. NEGLIGENCE, 1. RAILROADS, 10–12.

STRIKING matter from complaint. See PLEADING, 1.

SUBCONTRACTORS. See MUNICIPAL CORPORATIONS, 3. PRINCIPAL AND SURETY, 5.

SUBROGATION. See INSURANCE, 7. WORKMEN'S COMPENSATION, 20.

SUBSCRIPTION for stock. See CORPORATIONS.

SUMMONS: Service. See JUDGMENT, 1. PARTNERSHIP, 12, 13. PROCESS.

SUPPLEMENTARY ANSWER. See DIVORCE, 3, 4, 12.

SUPREME COURT. See APPEAL AND ERROR. COURTS, 1.

SURETYSHIP. See PRINCIPAL AND SURETY.

SURFACE WATER: Flooding of basement: Insufficiency of sewer. See MUNICIPAL CORPORATIONS, 15.

SUSPENSION.
Of absolute power of alienation. See PERPETUITIES.
Of ancient statutes. See DOWER.

TAKING OF PRIVATE PROPERTY: Compensation. See EMINENT DOMAIN. MILLS AND MILLDAMS. MUNICIPAL CORPORATIONS, 8. RAILROADS, 11, 12.

TAXATION.

Licensing street railway cars. See MUNICIPAL CORPORATIONS, 9–11.

Exemptions: Construction of statutes: "Benevolent association."

1. Statutes exempting property from taxation are not to be enlarged by construction. *M. E. Ch. Baraca Club v. Madison,* 207
2. A church club which was organized to provide for Bible study and for religious, social, and moral culture, and to maintain a home for its members, to whom no pecuniary benefits are ever to be paid, and which maintains a clubhouse as a home for its members, renting rooms to nonmembers when not desired by members, operating a public café, furnishing a meeting place for a Bible study class and aiding it to maintain interest in its work and to secure new members, but whose benevolent activities, properly so called, have consisted in securing positions for a few young men and furnishing a small number of free meals, is not a "benevolent association" whose property is, under sec. 1038, Stats., exempt from taxation. *Ibid.*

Inheritance taxes: Estate partly in another state.

3. A judgment of a circuit court affirming a judgment of a county court—to the effect that sub. 5, sec. 1087—11, Stats., did not apply to the estate of a resident of another state who died leaving an estate located partly in that state and partly in Wisconsin, and that the inheritance tax to be paid by those entitled to receive the estate in Wisconsin should be determined precisely as if the decedent's estate consisted only of the property located here—is affirmed, this court being equally divided on the question. *Estate of Carter,* 89

TELEGRAPHS.

Divulging contents of news message: Damages.

1. A newspaper reporter who, having a contract to furnish certain news to one paper exclusively, delivered the message to the telegraph company selected by that paper for its transmission, thereby parted with his property interest in such news, and cannot recover its value as an element of compensatory damages in an action against the company for divulging to other newspapers the contents of the message. *Marlatt v. W. U. Tel. Co.* 176
2. Nor can there be any recovery in such action for plaintiff's mental anguish or worry over the situation, whether the action be for breach of contract or in tort. Sub. 5, sec. 1778, Stats. 1915, fixing a maximum penalty for negligence of telegraph companies in receiving, copying, transmitting, or delivering messages is not applicable. *Ibid.*
3. A telegraph company is not liable in punitory damages for the unauthorized and wilful act of its agent in divulging the contents of a message unless it ratified such act. *Ibid.*
4. Where a telegraph company denounced the act of its agent in divulging the contents of a message and offered to discharge him, but was requested by plaintiff not to do so, and did not, it cannot be said to have ratified his act so as to be liable in punitory damages. *Ibid.*

TENDER.
Of payment. See EXECUTION, 4.
Of defense. See CONTRACTS, 7.

TENEMENT HOUSES: Regulation. See CONSTITUTIONAL LAW, 1–3.

TESTAMENTARY TRUSTS. See WILLS, 6.

TIME: Reasonableness. See CONTRACTS, 14.

TITLE.
To office. See QUO WARRANTO.
To land. See DEEDS. EXECUTION. PERPETUITIES. REPLEVIN. TRUSTS. VENDOR AND PURCHASER. WILLS, 5.
To personal property. See APPEAL, 4, 5. BANKS, 1–3. BILLS AND NOTES. CARRIERS, 1–13. CONTRACTS, 6–8. DEEDS, 1. GIFTS. TRUSTS, 4.

TORTS. See APPEAL, 11. ASSIGNMENTS. CARRIERS, 1–10, 15. CONTRIBUTION. COURTS, 2, 3. DAMAGES. EVIDENCE, 1, 2, 4. FRAUD, 1–3. HIGHWAYS. HOSPITALS. JUDGMENT, 2–5. MASTER AND SERVANT, 2–15. MUNICIPAL CORPORATIONS, 14, 15. NEGLIGENCE. NEW TRIAL. PARTIES. PRINCIPAL AND AGENT, 2. PRINCIPAL AND SURETY, 7. RAILROADS, 13–16. REPLEVIN. TELEGRAPHS. TRIAL, 2.

TOWN DRAINS. See DRAINS.

TOWN OFFICERS. See COUNTIES. DRAINS, 3–5.

TOWNS. See HIGHWAYS, 3–6.

TRANSACTIONS WITH DECEDENT. See INSURANCE, 11. TRUSTS, 2. WITNESSES, 2, 3.

TRIAL.

Place of trial. See VENUE.

By court or jury? Nature of action: Question how raised: Calendars.

1. If the facts stated in a complaint constitute a cause of action it is immaterial whether it be at law or in equity, except for the purpose of determining whether the parties are entitled to a jury trial under sec. 5, art. I, Const.; and that question (including the question whether plaintiff has an adequate remedy at law) may be raised by motion to place upon the court or jury calendar, or to strike therefrom, as the case may be. *Williams v. Oconomowoc,* 281

Reception of evidence: Mental competency of witnesses. See WITNESSES, 1.

Improper arguments to jury. See NEW TRIAL, 1.

Questions of fact: How tried. See RAILROADS, 4. VENDOR AND PURCHASER, 2.

Same: Questions for jury. See BROKERS, 2, 3. CARRIERS, 12, 15. HIGHWAYS, 1. HOSPITALS, 1. INSURANCE, 8. MASTER AND SERVANT, 6–9, 13. NEGLIGENCE, 2, 4. PRINCIPAL AND AGENT, 2. RAILROADS, 14–16.

Same: Direction of verdict. See BROKERS, 3.

Instructions to jury. See INSTRUCTIONS TO JURY.

Special verdict: Form and sufficiency. See MASTER AND SERVANT, 3. REPLEVIN, 2.

Same: Inconsistency. See EXECUTION, 3.

Same: Perversity.

2. In an action for injuries alleged to have been caused by a defective highway, a special verdict finding that the highway was

sufficient and that the plaintiff's damages were "nothing," is *held* not to have been perverse because of the latter finding, it appearing that the jury understood the effect of the first finding and naturally concluded that plaintiff was entitled to no damages. *Miner v. Rolling,* 213

Same: Omissions: Presumed findings by court. See REPLEVIN, 2.

Same: Setting aside verdict or changing answers. See APPEAL, 10. ASSIGNMENTS. ATTORNEY AND CLIENT. BROKERS, 2. INSURANCE, 8. MASTER AND SERVANT, 13. WILLS, 3.

Trial by court: Finding of fact or conclusion of law? See WATERS, 4.

Mistakes, omissions, amendments, etc. See EXECUTION, 6. PARENT AND CHILD, 3. REPLEVIN, 2. WATERS, 2. WORKMEN'S COMPENSATION, 13–16.

Same: Relief against orders, etc.

3. Not only the motion for relief, but also the order granting relief under sec. 2832, Stats., must be made within a year after the moving party has notice of the proceeding against which relief is sought. *Elmergreen v. Kern,* 560

New trial. See NEW TRIAL.

TROVER AND CONVERSION. See CARRIERS, 2, 3. COURTS, 2.

TRUST COMPANIES. See BANKS AND BANKING, 1–3.

TRUSTS AND TRUSTEES.

See BANKS AND BANKING, 1–3. WILLS, 6.

1. In an action to establish a trust in land, findings by the trial court that an oral agreement was made between E. (plaintiffs' deceased father) and his parents that in consideration of his supporting and caring for them during their lives they would convey to him their farm and personal property; that by virtue of such agreement he took actual possession of the land and personal property and continued in possession thereof; and that he fully performed the agreement on his part, are *held* to be sustained by the evidence. *Glander v. Glander,* 12
2. The legal title to such land having come to a brother of E., in the action to establish a trust in favor of E.'s children his widow was not incompetent, under sec. 4069, Stats., to testify to the making of said oral agreement, since the plaintiffs did not claim from, through, or under her, and she was not a party, either necessary or proper, to the action, and, E. having never been seised of the premises, she was never entitled to any dower interest therein. *Ibid.*
3. Parol evidence was admissible to show that a mortgage of said land, given by E.'s widow to his brother when the latter conveyed the land to her, was to be held by the brother as trustee for the plaintiffs, E.'s children, although such trust was not expressed in the instrument. *Ibid.*
4. The amount of the mortgage above mentioned having been paid to E.'s said brother after a sale of the land, and the purpose of this action being to follow said fund and impress it with a trust in favor of plaintiffs, another brother of E., who received no part of said fund, cannot be held liable therefor as trustee, even though he may have assisted the brother first mentioned by making false representations to E.'s widow. *Ibid.*

UNDUE INFLUENCE. See WILLS, 2, 3.

UNITED STATES: Contracts relating to government work: Construction. See CONTRACTS, 2–15.

UNLAWFUL DETAINER.

Appeal from justice's court: Counterclaim: Judgment.

1. Upon an appeal from the judgment of a justice in an action for unlawful detainer, the case being triable in the same manner as cases originally brought in the circuit court, a counterclaim relating to the same subject matter, *i. e.* the right to possession of the land, is properly pleadable and may be heard and disposed of in the action. *Booher v. Slathar,* 196
2. Although the time has gone by within which the court could place the lessee in possession again under any agreement which, upon his counterclaim in an unlawful detainer action, may be found to have been made and to be enforceable, he may still have it declared that he was entitled to such relief, since his right against the plaintiff would thereby be affected. *Ibid.*

VACATION of streets. See MUNICIPAL CORPORATIONS, 12, 13. RAILROADS, 10–12.

VALUE. See DEEDS, 1. EVIDENCE, 3.

VENDOR AND PURCHASER OF LAND.

See ATTORNEY AND CLIENT. BROKERS, 3. DEEDS. EVIDENCE, 3. INSURANCE, 1–3. MORTGAGES. PLEADING, 1.

Requisites and validity of contract: Statute of frauds: Description.

1. A written memorandum acknowledging receipt from C. V. of $15, "as part payment of $2,400, when warranty deed and abstract is given to" real property described, and signed by the owner's authorized agent, is a sufficient contract for the sale of land, under sec. 2304, Stats. No time of payment being specified, the payment is to be cash on delivery of the deed and abstract showing good title, a reasonable time being allowed for examination of the abstract. *Douglas v. Vorpahl,* 244
2. The description in a contract for the sale of land is sufficient if, with the aid of the surrounding circumstances, it can be determined with reasonable certainty what land was intended; and that is a matter to be determined by the evidence on the trial, not upon a demurrer to the complaint setting out the contract. *Ibid.*

Oral contract: Performance: Possession. See TRUSTS, 1.

Title and estate of vendor.

3. A widow who, under her husband's will, took the absolute title to real property subject to be defeated by her remarriage, and was not given the power of disposition, cannot convey a good and marketable title in fee simple. *Weymouth v. Gray,* 218

Remedies of vendor: Election: Foreclosure: Recovery on notes.

4. By the terms of a land contract a note given by the purchasers was to apply, when paid, as a part of the purchase price. In an action for strict foreclosure of the contract the vendor elected to treat the amount of said note as a part of the amount to be paid by the purchasers as a condition of relief from their default. Upon their failure to pay, he obtained possession of the land and the foreclosure judgment was made absolute.

Held, that he could not thereafter enforce payment of the note. *Kunz v. Whitney*, 446

5. Neither the fact that a different rate of interest was to be paid on said note than on other payments provided for in the land contract, nor the fact that the rental value of the premises while occupied by the purchasers was in excess of all payments made by them, gives the vendor any right to recover on the note. *Ibid.*

Remedies of purchaser: Exchange of property: Fraud. See REPLEVIN.

VENUE.

Change of venue. See COURTS, 1.

1. A demand for a change of the place of trial of an action brought in a county in which none of the defendants resided, asking that the trial "be had within the proper county, to wit," M. county, in which one of the defendants resided, *or* R. county, in which the others resided, and stating the facts as to such residence, was in proper form. *Stahl v. Broeckert*, 113
2. After such demand, a written consent seasonably served by plaintiff's attorneys that the place of trial be changed to R. county *ipso facto* changed the place, no order of the court being necessary; and it became the duty of plaintiff to procure the transmittal of the papers. *Ibid.*
3. Where an action is not commenced in the proper county any defendant may demand that it be tried in the proper county, although the other defendants do not join in such demand. *Ibid.*
4. Even if, in such case, it were necessary that all defendants join in the demand for a change of the place of trial, defendants who have not appeared in the action need not be joined. *Ibid.*
5. In the case above stated, any defects in the application for a change of the place of trial were waived when plaintiff's attorneys noticed the case for trial in the circuit court for R. county and when they appeared in that court to oppose a motion for a change to M. county on account of the convenience of witnesses. *Ibid.*
6. The circuit court for R. county having acquired jurisdiction of the action could again change the place of trial to M. county on account of the convenience of witnesses. *Ibid.*

VERDICT. See TRIAL.

VESTED RIGHTS. See INSURANCE, 9, 10.

VOTERS: Qualifications. See ELECTIONS. QUO WARRANTO.

WAGES: Forfeiture. See MASTER AND SERVANT, 1.

WAIVER.
Of right to appeal. See APPEAL, 3–5.
Of claim under contract. See CONTRACTS, 9.
Of rights under contractor's bond. See PRINCIPAL AND SURETY, 6.
Of defects in application for change of place of trial. See VENUE, 5.

WATERS AND WATERCOURSES.

Prescriptive rights as to waters of stream: Riparian rights.

1. The claim of a lower mill owner to prescriptive rights in the use of the waters of a stream is *held* not well founded as against the older rights of an upper mill owner. *Apfelbacher v. State*, 233

2. Although plaintiff's claim was based upon alleged prescriptive rights in the use of the waters of a stream, the court might properly grant relief upon the basis of rights which he had as a riparian owner merely, the complaint being considered as amended to conform with the evidence properly before the court. *Ibid.*

3. The owner of an upper dam has the right to withhold and store up the waters of the stream at certain periods in order that he may more properly and efficiently carry out the purpose to which he, as riparian owner, may put such waters; but this right, like all other rights which a riparian owner, as such, acquires to the waters of the stream, is restricted always to a reasonable detention or a reasonable use measured and determined with reference to the capacity of the stream, the uses to which it is and has been put, and the rights of other riparian owners. *Ibid.*

4. In an action by a lower mill-owner against the state and the owner of an upper dam at the outlet of a lake, a finding by the court that the withholding by the state at times, under a contract with said upper owner, of the flow of water from the lake into the stream was not a reasonable or necessary use of the waters for the proper carrying on of a fish hatchery, is not a mere conclusion of law but a finding of the ultimate fact upon which a determination of the rights of the parties must be based. *Ibid.*

5. The state cannot acquire from a riparian owner by contract a greater right as to the withholding of the waters of a stream than such owner had, or use such right in a way which would be unreasonable if the use were by said owner. *Ibid.*

Flowage of lands. See DRAINS. MILLS AND MILLDAMS.

Surface waters: Insufficiency of sewer. See MUNICIPAL CORPORATIONS, 16.

Public water supply: Failure of: Liability. See MUNICIPAL CORPORATIONS, 14. NEGLIGENCE, 3.

Waterworks: Interference with service. See NEGLIGENCE, 3.

WILLS.

Execution.

1. The presumption arising from recitals in the attestation clause showing due execution of a will is *held* in this case to have been overcome by the evidence, which supports the findings of the county and circuit courts that the will was not properly executed. *Will of Hall,* 286

Undue influence.

2. Where the chief beneficiary under a will had opportunity and the disposition to influence the testatrix, and the coveted result expressed in the will was attained by coercion, not by importunity merely, the will must be set aside. *Will of Bocker,* 100

3. The evidence in this case is *held* to show, contrary to findings by the county and circuit courts, that undue influence was exercised upon a testatrix by an adopted daughter to whom practically the whole estate was given. *Ibid.*

Probate: Agreement not to contest: Validity.

[4. Whether a contract by which, in consideration of one son refraining from contesting his father's will, two other sons agreed to

pay him a certain sum after their mother's death, was a valid agreement, is not considered in this case.] *Estate of Kleinschmidt*, 450

Construction: Estates created. See VENDOR AND PURCHASER, 3.

5. By his will a testator gave to his wife "the homestead now occupied by me, with all furniture and all belongings thereto, for her sole use and benefit," and in the same paragraph directed that there should be paid to her $1,000 yearly "for her support during her lifetime." After another bequest he gave "all the rest, residue, and remainder of my estates, both real and personal," to his son. At the time of making the will the testator had no real estate other than the homestead. *Held*, that under sec. 2278, Stats. (providing that every devise of land shall be construed to convey all the estate of the devisor which he could lawfully devise, unless it shall clearly appear by the will that he intended to convey a less estate), the wife took the homestead in fee and not merely a life estate therein. *Will of Brooks*, 75

Same: Estates in trust: Interest of widow.

6. Construing together various provisions of a will it is *held* that it was the testator's intention to give to the widow, as a part of the provision made for her, a beneficial interest to the extent of $3,000 each year in the $5,000 which was to be paid to her annually by trustees for the support and education of two sons until they reached the age of twenty-five years; that such interest ceased when she renounced the provision made for her in the will; and that the amount to be paid to her annually thereafter for the care and education of the sons is $2,000. *Will of Hagemeister*, 246

WITNESSES.

Competency: Mental capacity.

1. The mental competency of a witness to testify is largely a question for the trial court, and impaired mental condition ordinarily goes to the weight or credibility of the evidence. *Pawlak v. Pelkey*, 367

Same: Transactions with persons since deceased. See INSURANCE, 11. TRUSTS, 2.

2. The widow of a deceased employee, claiming compensation under the statute for his death, is not incompetent under sec. 4069, Stats., to testify to transactions and communications (not private) with the decedent. *A. Breslauer Co. v. Ind. Comm.* 202

3. The parties adverse to the estate of a decedent who claimed to have received notes as a gift from his father (also deceased) having called a witness to testify to a conversation with the son and having proved by him declarations of the son to the effect that he got the notes in question from his father, such testimony was not incompetent under sec. 4069, Stats.; and a part of the conversation between the witness and the son having been thus elicited, those representing the son's estate were entitled to show the whole of it. *Hilton v. Rahr*, 161 Wis. 619, distinguished. *Estate of Gilbert*, 291

Expert witnesses. See CRIMINAL LAW, 1. EVIDENCE, 7, 8.

WORDS AND PHRASES.
Accrue or become absolute, in statute. See EXECUTORS, 4.
Additions thereto, in fire policy. See INSURANCE, 4, 5.
Adverse parties. See JUDGMENT, 4.
Benevolent association, in statute. See TAXATION, 2.
Carelessness, in contract. See PRINCIPAL AND SURETY, 7.
Casual employment, in statute. See WORKMEN'S COMPENSATION, 5–8.
Charitable use, in statute. See PERPETUITIES.
Committed, in statute. See INFANTS.
Connected with the subject of the action, in statute. See REPLEVIN, 1.
Contingent claim, in statute. See EXECUTORS, 5.
Crime, in statute. See PHYSICIANS AND SURGEONS, 5.
Cruel and unusual punishments, in constitution. See PHYSICIANS AND SURGEONS, 3.
Derived from the husband, in statute. See DIVORCE, 8.
Employee. See MASTER AND SERVANT, 5.
Employment, in statute. See WORKMEN'S COMPENSATION, 4.
Expressly bound. See PRINCIPAL AND SURETY, 4.
Extension of railroad, in statute. See RAILROADS, 1.
Furnish purchase money, in contract. See PARTNERSHIP, 1.
Going from his employment in the ordinary and usual way, in statute. See WORKMEN'S COMPENSATION, 3.
Good will. See FRAUD, 4.
Habitation, in statute. See ELECTIONS, 2.
Heat, in lease. See LANDLORD AND TENANT, 2–4.
Industry or enterprise, in statute. See RAILROADS, 5.
Injure, in statute. See MILLS AND MILLDAMS.
Juvenile court, in statute. See JUVENILE COURTS.
Legal process, fair on its face. See CARRIERS, 5.
Licensee. See CARRIERS, 14.
Misrouting, in statute. See CARRIERS, 11.
Mistake, in statute. See WORKMEN'S COMPENSATION, 14–16.
Performing service growing out of and incidental to his employment, in statute. See WORKMEN'S COMPENSATION, 1–3.
Personal liability, in statute. See CORPORATIONS, 1.
Practically indispensable, in statute. See RAILROADS, 6, 7.
Proceeding in a court of record. See MUNICIPAL CORPORATIONS, 16.
Procure further insurance, in fire policy. See INSURANCE, 6.
Property taken for public use, in constitution. See EMINENT DOMAIN.
Provide purchase money, in contract. See PARTNERSHIP, 1.
Public use. See RAILROADS, 2.
Residents, in statute. See ELECTIONS.
Road vehicles, in statute. See MUNICIPAL CORPORATIONS, 11.
Scope of employment. See MASTER AND SERVANT, 15.
Sentenced to imprisonment, in statute. See CRIMINAL LAW, 4.
Shall, in statute. See PHYSICIANS AND SURGEONS, 4.
Special damages, in statute. See RAILROADS, 12.
Spur track, in statute. See RAILROADS, 1.
Subcontractor, in contract. See MUNICIPAL CORPORATIONS, 3. PRINCIPAL AND SURETY, 5.
Successful operation, in statute. See RAILROADS, 6, 7.
Sufficient cause, in statute. See DIVORCE, 2.
Suspended statute, in constitution. See DOWER.
Taking of property, in constitution. See MUNICIPAL CORPORATIONS, 8.

Then present value, in statute. See EXECUTORS, 3.
Unreasonable, in statute. See RAILROADS, 4.
Unreasonably harmful to public interest, in statute. See RAILROADS, 8.
Usual course of the business, in statute. See WORKMEN'S COMPENSATION, 7.
Usual way, in statute. See MASTER AND SERVANT, 6. WORKMEN'S COMPENSATION, 3.
Within twenty days, in statute. See WORKMEN'S COMPENSATION, 16.

WORKMEN'S COMPENSATION.

Conditions of liability: "Performing service growing out of and incidental to his employment."

1. An employee, whose duty it was to transfer mail from a train on one railroad to a waiting train in a nearby station of another road, met the incoming train as it was coming to a stop at a crossing opposite said station and, the door of the mail car not being open as usual to discharge the pouch, climbed upon the side of the car to attract the mail clerk's attention or to ride upon the car to its depot. This method had been adopted and followed by others in doing the work, in order to expedite the transfer. In so boarding the car he fell and was fatally injured. *Held*, that he was at the time "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats. *White v. Industrial Comm.* 483
2. While an electrician was getting a drink, charged testing wires were placed, by a fellow workman, in contact with the tools which he was using, and when he resumed work he received a fatal shock. His duty to his employer required him to work at that place and to use and to come in contact with the tools and wires which caused his death. *Held*, that he was at the time "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats., and that the injuries sustained grew out of and were incidental to the employment, even though his fellow workman had adjusted the wires for the purpose of playing a joke on him, supposing he would receive only a slight shock, and even though he himself had a few minutes earlier suggested that the fellow workman touch a certain piece of iron which was perhaps charged, his own participation in the joking or larking, if such it was, having terminated some time before the injury. *Federal R. M. Co. v. Havolic*, 162 Wis. 341, distinguished. *Newport H. C. Co. v. Industrial Comm.* 630

Same: "Going . . . from his employment in the ordinary and usual way." See MASTER AND SERVANT, 5, 6.

3. A finding by the industrial commission that an employee, who was injured when he attempted to catch a ride towards his home upon a freight train which was leaving the platform at the planing mill in which he worked, was "going from his employment in the ordinary and usual way," is *held* not to be sustained by the evidence. *Foster-Latimer L. Co. v. Industrial Comm.* 337

Who are employees: Casual employment: Usual course of the business.

4. The term "employment," as used in sub. (2), sec. 2394—7, Stats. 1915, refers to the nature or kind of service rendered rather

than to the nature of the contract of hiring. *Holmen C. Asso. v. Industrial Comm.* 470

5. An employment which "is but casual," within the meaning of said statute, is one which is only occasional, or comes at uncertain times, or at irregular intervals, and whose happening cannot be reasonably anticipated as certain or likely to occur or become necessary or desirable. *Ibid.*

6. Repairs upon a building used for business purposes are an essential part of the business and, though they come at irregular intervals and the exact time when they will be needed cannot be foretold, are to be anticipated, provided for, and made when necessary or convenient; hence, although a workman who was injured while making repairs on a creamery building had been, on that as on several previous occasions, specially hired for the repair work only, his employment was not merely "casual," within the meaning of sub. (2), sec. 2394—7, Stats. 1915. *Ibid.*

7. Where one was employed to assist in cleaning up certain parts of a packing plant, although this was not a part of the regular cleaning-up work necessary in the usual conduct of the industry, but was necessitated by special and unusual repair work which had just been completed, his employment was neither "casual" nor without the "usual course of the . . . business" of his employer, within the meaning of sub. (2), sec. 2394—7, Stats. 1915. *F. C. Gross & Bros. Co. v. Industrial Comm.* 612

8. Where one was called in at irregular intervals when extra help was needed or when a regular employee was absent, and worked at the regular business carried on by his employer, his employment was not "casual," within the meaning of sub. (2), sec. 2394—7, Stats. 1915. *Jordan v. Weinman,* 474

Scale of compensation.

9. Under sub. (5) (e), sec. 2394—9, Stats. 1915, an employee whose injury resulted in a fracture of the tibia and a permanent impairment of the use of his ankle might be awarded compensation for temporary total disability during the healing period, as well as for the subsequent permanent partial disability, even though he would thereby receive a larger sum than could be allowed, under sub. (5) (a) (28), sec. 2394—9, Stats. 1915, if he had lost his foot at the ankle. *Wis. Lakes I. & C. Co. v. Industrial Comm.* 122

Notice of injury: Failure to give.

10. Failure to give the notice required by sec. 2394—11, Stats., did not preclude recovery of compensation for the death of an employee, where the employer had actual notice of the accident within ten days and there was no intention to mislead the employer and he was not in fact misled by said failure. *A. Breslauer Co. v. Industrial Comm.* 202

11. The burden of proof, in such a case, is upon the employer to show that he was misled and prejudiced by the failure to give the statutory notice of injury. *Ibid.*

12. A finding by the industrial commission and a holding by the trial court, to the effect that the failure in this case to give the notice required by sec. 2394—11, Stats., within thirty days after an injury to an employee, was not with the intention of misleading the employer and that he was not in fact misled thereby or prejudiced by being deprived of an opportunity either to investigate the claim or to furnish surgical aid which would

have saved the employee's life, are *held* to have been warranted by the evidence. *Vasey v. Industrial Comm.* 479

Hearing before industrial commission: Competency of widow as witness. See WITNESSES, 2.

Findings and award: Amendment: Correction of mistakes.

13. Where findings and an award made and entered by the industrial commission on April 30th were amended within ten days as authorized by sec. 2394—17, Stats., the amendment being a mere correction of the computation, based on facts previously found, and there being no recital of the hearing or of any new findings or award and no vacation or change of any substantial part of the order of April 30th, the complaint in an action to review the award properly described the findings and award as having been entered on April 30th. *Foster-Latimer L. Co. v. Industrial Comm.* 337

14. Where at the time of the hearing before the industrial commission all parties to the proceeding supposed that the only injury to the claimant was the loss of the fingers of one hand, and the award was made on that supposition, but it was afterwards discovered that there was also a loss of a part of the bones of the hand, this was a "mistake," within the meaning of sec. 2394—17, Stats., which might be corrected by the commission by modifying the award, even though an action to review the award had already been brought. *Jordan v. Weinman,* 474

15. Modification of an award, when authorized by sec. 2394—17, Stats., may be accomplished as well by vacating it and entering an entirely new award as by making simply an order of modification and letting the original award stand as modified. *Ibid.*

16. Where the mistake is such that a further hearing is necessary and, because ten days' notice of the hearing must be given to parties interested, the modification of the award cannot be made "within twenty days from the date thereof," as provided in sec. 2394—17, Stats. 1917, that requirement of the statute is satisfied if the proceedings to correct the mistake be commenced and the notice of hearing be given within the twenty-day period and pressed to a conclusion with all convenient speed. *Ibid.*

Same: Evidence: Sufficiency: Cause of death.

17. Where an employee fell from a ladder and nine days later died of pneumonia, the employer's report of the accident, stating that the employee was not injured, and the answer before the industrial commission, stating that the injuries were slight and had no connection with his death, were evidence of the accident only. *A. Breslauer Co. v. Industrial Comm.* 202

18. Evidence in such case that the employee was externally bruised and suffered much pain, together with testimony of physicians tending to show that the trauma caused by the fall was likely to result in pneumonia, which caused his death, is *held* to support a finding by the industrial commission that the death proximately resulted from the fall. *Ibid.*

Action to review award: Evidence: Harmless errors.

19. In an action to review an award by the industrial commission the admission of hearsay evidence was harmless error where the trial court, in its opinion, expressly states that such evidence was not considered, and there is sufficient competent evi-

dence to support the decision. *A. Breslauer Co. v. Industrial Comm.* 202

Liability of third persons: Insurers: Subrogation.

20. Under sec. 29 of the Illinois workmen's compensation act, where the injury or death of an employee for which compensation is payable under the act was not caused by negligence of the employer or his employees, and a third person is legally liable therefor, the employer is merely subrogated to the right to enforce the claim of the employee or his personal representative against such third person, and the amount recovered is to be apportioned as therein prescribed. No such right of action is vested in the employer as would pass by subrogation to an insurer of the employer against loss under the compensation act; hence, although the insurer has paid the amount of compensation which was payable under the act, the employer is the proper party to prosecute the action to enforce the legal liability of said third person to the employee or his personal representative. *Marshall-Jackson Co. v. Jeffery,* 63